Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

KENNETH G. MIDDLETON,

Petitioner,

v.

MICHAEL KEMNA, Superintendent,
Crossroads Correctional Center,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court violated *Lindh v. Murphy*, 521 U.S. 320 (1997), and *Thompson v. Koehane*, 516 U.S. 99 (1995), when it denied de novo review of mixed questions of fact and law which were set out in Middleton's petition for writ of habeas corpus filed November 13, 1995, well before the effective date of the AEDPA?

2. Whether Middleton's fifth and sixth amendment rights were violated by the use in evidence of statements he made in response to an un-Mirandized custodial interrogation?

3. Whether a district court may procedurally bar claims and evidence which the state court explicitly reached on the merits, without relying on any arguably applicable procedural bar grounds, and where the procedural and factual bars in question resulted from constitutionally ineffective actions by trial and appellate counsel?

4. Whether the court of appeals erred in determining that petitioner, who filed his habeas corpus petition before the 1996 amendments to 28 U.S.C. § 2253 and § 2254, was required to obtain a certificate of probable cause, rather than a certificate of appealability, before proceeding in the court of appeals?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth G. Middleton prays that a writ of certiorari will issue to review the judgment of the courts below, which denied him habeas corpus relief from a sentence of life without parole imposed pursuant to a conviction for the murder of his wife.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eighth Circuit denying a certificate of appealability is unpublished, and is found in the Appendix at p. 1. The Order of the Court of Appeals denying Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* is found in the Appendix at p. 50. The decision of the United States District Court for the Western District of Missouri is unpublished, and is found in the Appendix at p. 2.

JURISDICTION

The decision of the Court of Appeals was issued on January 25, 1999. (App. 1). A timely Petition for Rehearing or Rehearing *En Banc* was denied on March 16, 1999. On June 7, 1999, Circuit Justice Clarence M. Thomas issued an order, under Rule 13, pursuant to petitioner's request, extending the time within which to file this Petition to August 13, 1999.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

> which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 28 U.S.C. § 2254(a), which provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

This case also involves 28 U.S.C. § 2253, which provides:

> In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or circuit justice or judge issues a certificate of probable cause.

This case also involves amended 28 U.S.C. § 2253 (1996) which provides:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from –
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of a process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Petitioner, Kenneth G. Middleton, seeks review of the orders of the courts below denying him appellate review of the district court's judgment dismissing his petition for writ of habeas corpus challenging his convictions for first degree murder and armed criminal action based on the 1990 shooting death of his wife, Katherine Middleton, in Blue Springs, Missouri.

On February 12, 1990, at 1:30 p.m., Mrs. Katherine Middleton told a co-worker that she was going home because her husband has called saying he was sick. (App. 3). Approximately twenty minutes later, at 1:52 p.m., Mr. Middleton placed a frantic 911 call stating that his wife had been shot. (App. 3). The first officer to arrive at the Middleton home, John Gale, took up a position at the house next door to wait for back-up. (App. 3). After several minutes, Mr. Middleton called 911 again, urging the ambulance to hurry, then he went outside to look for it. (App. 3).

At that time, Blue Springs, Missouri, Officer John Gale approached Mr. Middleton with his gun drawn. (App. 3). Upon determining that Petitioner was not armed, Gale escorted Mr. Middleton into the house, (App. 3), where he found Mrs. Middleton, apparently dead from a gunshot wound to her head. (App. 4). Mr. Middleton became hysterical, (App. 4), and fell to the floor. (Tr. Trans. at 158).

As numerous police officers and paramedics secured and searched his home, Mr. Middleton was subjected to a patdown search and repeatedly questioned, without the benefit of *Miranda* warnings. (Tr. Trans. 44, 162-63). He gave several oral statements, denying that he killed his wife, and suggesting that her death occurred accidentally when he blacked out while handing her his gun. The prosecution elicited testimony regarding all the statements, and drew inferences of guilt from discrepancies between his statements and inconsistencies with the physical evidence. (App. 10). In response to Gale's initial

questioning, Mr. Middleton told Gale that he had called his wife to come home because he felt ill, that she had taken the gun he was cleaning from him, and then dropped it on her way to phone the doctor, causing it to discharge. (App. 4).

Because of his agitated state, elevated blood pressure and transient chest pains, paramedics urged Petitioner to go to the hospital. (Tr. Trans. at 247-48). Before the ambulance departed, police officers forcibly subjected Mr. Middleton to a gun powder residue test. (Tr. Trans. at 237-38).[1]

En route to the hospital, the interrogation continued, still without advising Mr. Middleton of his rights under *Miranda*. (Tr. Trans. at 63-64). Mr. Middleton answered questions, but became unresponsive. (App. 6). Spartz testified that in his opinion, Petitioner was "pretending to pass out." However, Paramedic Wedlock performed several tests to determine Mr. Middleton's level of consciousness (App. 6), and testified that Middleton was "neither in the white areas of verbal consciousness . . . [nor] in the black areas of unconsciousness." (Tr. Trans. at 244).

At the hospital, Spartz removed and seized petitioner's boots and clothing from his person, and posted guard outside Mr. Middleton's room until he was able to resume his interrogation. (App. 6). When Mr. Middleton began to respond to hospital personnel, Spartz interrogated Petitioner yet again without *Miranda* warnings. (Tr. Trans. at 63). Spartz testified that this time Petitioner told him that his wife "was on the phone and he went to hand her the gun. And where he doesn't know what happened, he fell backwards and the next thing you know, she was on the floor." (Tr. Trans. at 183).

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[1] No gun powder residue or blood was found on Petitioner's hands or the long sleeve shirt he was wearing, or the towel on which Mr. Middleton dried his hands after splashing his face with water. (Tr. Trans. at 333, 341).

Although the police asked to be notified prior to Mr. Middleton's release, Mr. Middleton was transferred to a mental health facility, where he was involuntarily admitted until his brother agreed to be responsible for him. Shortly after his release from the hospital, Officers Vasquez, Curby, and Olsen arrested Mr. Middleton and took him to the police station for questioning. (Tr. Trans. at 67-69). Mr. Middleton accompanied the officers to the station, and upon receiving his *Miranda* warnings, he invoked his rights. (Tr. Trans. at 70-72). Nevertheless, questioning persisted, and Mr. Middleton made another statement, consistent with his un-Mirandized statement at the hospital, denying any guilt in the death of his wife. This statement was suppressed by the trial court, and was not presented to the jury.[2] (Tr. Trans. at 94). Petitioner was then fingerprinted and photographed, then released. He was arrested on February 27, 1990, and was charged on March 9, 1990, with first degree murder, RSMo. § 565.020.1 and armed criminal action, RSMo. § 571.015. The trial commenced on February 19, 1991.

Medical Examiner John Overman testified, by deposition, that Mrs. Middleton died from a gunshot wound to the head. The fatal bullet entered above her left eye and passed through her head at an upward angle. Dr. Overman opined that the death was not a suicide. No stippling was found on Mrs. Middleton's arms or hands, and no defensive wounds were found on the body. (Tr. Trans. at 30, 31). Mrs. Middleton had "faint fresh appearing bruises" across her chest caused by blunt trauma of unknown origin. (App. 7). The bruises were circular and

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[2] Petitioner told authorities that after his wife had gone into the dining area to phone the doctor, he began to feel particularly ill. He started to go into the kitchen to splash water on his face, carrying the handgun he had been cleaning. As he approached his wife in the dining room-kitchen area, he became extremely dizzy, and, when he reached out to hand her the gun, he blacked out. When he woke, he found his wife had been shot and he immediately called 911. (Tr. Trans. at 72).

approximately one to one and one-half inches in diameter (Tr. Trans. at 19) and were "consistent with" having been grabbed by the blouse and pressed against the wall. (App. 7). However, Dr. Overman conceded that they may have been caused by a fall against the cross base of a chair which had a tubular metal back (Tr. Trans. at 270) or by paramedics responding to the scene (Tr. Trans. at 232), or by detectives who undressed and redressed the body at the scene. (Tr. Trans. at 34, 134).

Crime scene examiners found a button that was apparently torn off the decedent's blouse "by some sort of force" (Tr. Trans. 352), and an indentation in the sheetrock wall near where Mrs. Middleton fell that was consistent with the boots that were seized from Mr. Middleton at the hospital. (Tr. Trans. at 354-55). However, the witness could not say when the imprint was actually made or even that it was made by Petitioner's boots, (Tr. Trans. at 355), and tests revealed that no gypsum, found in sheetrock, was found on petitioner's boots. (Tr. Trans. at 339). A revolver lay on an ottoman near the body.

The fatal gunshot was from the revolver found at the scene. The state's firearms examiner opined that the gun was 12 inches from Mrs. Middleton's head when it discharged. (Tr. Trans. at 384). The examiner had "drop tested" the gun and had concluded that it would not fire unless the trigger was held back. (Tr. Trans. at 395-98). When drop tests were performed when the gun was cocked, the hammer did fall forward. (Tr. Trans. at 396). Frank Booth, a chemist from the Regional Crime Lab of the Kansas City Police Department, concluded that, based on blood stains and the location of the bullet hole, Mrs. Middleton's head was about two inches from the wall when the bullet passed through it. (Tr. Trans. at 317). Booth also testified that a small blood stain found on Petitioner's pant leg was consistent with her blood. However, no test was done to eliminate the possibility that the stain was defendant's own blood, (Tr. Trans. at 305-09), and may have resulted when an IV needle was inserted in

his wrist in the ambulance before his jeans were seized.[3] (Tr. Trans. at 180, 197).

A neighbor testified that the front window of the Middleton residence was usually clear of blinds, but that the blinds were closed on the afternoon the death occurred. (Tr. Trans. at 214). The neighbor also testified that he saw Mrs. Middleton's car in the driveway at 12:30, the same time he noticed the blinds were closed. (Tr. Trans. at 217). Finally, the prosecution elicited testimony from a paramedic and police officers that Petitioner had not "shed a tear" at the scene of his wife's death, (Tr. Trans. at 110, 184, 226-27, 295), and from Petitioner's sister-in-law that he had shed tears at his mother-in-law's funeral. (Tr. Trans. at 295).

On February 22, 1991, the jury returned a verdict of guilty on both charges. Petitioner was sentenced on April 5, 1991, to concurrent sentences of life imprisonment without probation or parole for first-degree murder and 200 years for armed criminal action. (App. 2).

Petitioner filed a timely notice of appeal to the Missouri Court of Appeals, Western District. (T.L.F. at 50). On September 9, 1991, Petitioner filed a timely *pro se* Rule 29.15 motion, seeking to set aside his convictions and sentences. (PCR L.F. at 1). An amended motion was filed on November 25, 1991. (PCR L.F. at 8). After an evidentiary hearing on March 13, 1992, the trial court denied the motion on April 9, 1992. (PCR L.F. at 37). Petitioner's direct appeal and Rule 29.15 appeal were consolidated pursuant to Rule 29.15(1). The Missouri Court of Appeals affirmed Petitioner's convictions and the denial of his Rule 29.15 motion on April 6, 1993. *State v. Middleton*, 854

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[3] The victim had Type A blood with a 2 plus 1 PGM pattern. Petitioner's blood is also Type A. Although his PGM pattern is unknown, approximately 20 percent of the population has PGM type 2 plus 1. (Tr. Trans. at 309).

S.W.2d 504 (1993). Petitioner's timely Motion for Rehearing and/or Transfer to the Supreme Court was denied on June 29, 1993.

Mr. Middleton filed a pro se petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Missouri, which was received by the court on November 15, 1995, filed on December 4, 1995, and which was promptly transferred to the Western District of Missouri. Counsel filed first and second amended petitions, which were denied by the district court. Even though Mr. Middleton's petition was filed prior to the effective date of the Anti-terrorism and Effective Death Penalty Act, ("AEDPA"), the district court erroneously applied the AEDPA's deferential standard of review, and ruled that the state court decision:

> is clearly a reasonable interpretation of United States Supreme Court precedent which should be left undisturbed in a habeas corpus action. *See* 28 U.S.C. § 2254(d); *Drinkard v. Johnson*, 97 F.3d at 769 (noting that court rulings debatable among reasonable jurists must be upheld under § 2254(d) of the AEDPA).

(App. 22). Petitioner filed a timely notice of appeal to the Eighth Circuit Court of Appeals, and applied for a Certificate of Probable Cause or in the Alternative for Certificate of Appealability, which was denied without opinion on January 25, 1999. (App. 1). Petitioner's timely Application for Rehearing or Rehearing *en banc* was denied on March 16, 1999. (App. 50). Petitioner requested and was granted an extension of time, until August 13, 1999, within which to file this petition.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT DECISION CONFLICTS WITH *LINDH V. MURPHY*, 521 U.S. 320 (1997), AND *THOMPSON V. KOEHANE*, 516 U.S. 99 (1995), WHEN IT REFUSED TO REVIEW *DE NOVO* MIXED QUESTIONS OF FACT AND LAW WHICH WERE SET OUT IN MIDDLETON'S PETITION FOR A WRIT OF HABEAS CORPUS THAT WAS FILED ON NOVEMBER 13, 1995, WELL BEFORE THE EFFECTIVE DATE OF THE AEDPA.

Even though Mr. Middleton filed a pro se petition for habeas corpus on December 4, 1995, well before the enactment of the AEDPA, the district court relied upon the deferential standard of review provisions of 28 U.S.C. § 2254(d) as amended in 1996, to deny Mr. Middleton's petition. Rather than deciding the merits of petitioner's individual claims, the district court examined the state court decision to determine whether it was "a reasonable interpretation of United States Supreme Court precedent," citing 28 U.S.C. § 2254(d) (1996) and *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1997), a post-AEDPA case, and concluded that "court rulings debatable among reasonable jurists must be upheld." (App. 22). The district court applied this standard, either explicitly or inferentially, to all of petitioner's claims. (App. 45).

The district court's justification for applying the new statute to petitioner was the filing of an amended petition after the effective date of the AEDPA. (App. 46). However, the court did not distinguish between claims properly raised in the original pre-AEDPA pro se petition and those appearing in the amended petition. Thus, even though Mr. Middleton challenged the sufficiency of evidence to convict him of first degree murder in his pro se petition, (App. 2), the district court denied relief based upon a finding that "[T]he opinion of the Missouri Court of Appeals is consistent with a reasonable application of

the United States Supreme Court precedent of *Jackson v. Virginia*, 443 U.S. 307 (1979)." (App. 11).

In spite of Mr. Middleton's pro se claim that the prosecutor repeatedly commented on his silence, (App. 19-23), the district court ruled that the state court decision "is clearly a reasonable interpretation of United States Supreme Court precedent which should be left undisturbed in a habeas corpus action. *See* 28 U.S.C. § 2254(d); *Drinkard v. Johnson*, 97 F.3d at 769." (App. 22). Petitioner also claimed in his pro se petition that he was denied the effective assistance of counsel, but the district court again applied the deferential standard of review, ruling that the state court "acted reasonably in denying petitioner's claim . . . [and] reasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984)." (App. 28). Petitioner's claim that his statements were taken in violation of *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), was cursorily denied by the district court who simply reproduced verbatim three pages of the state court opinion, followed by the factually incorrect statement that "the record does not reflect that petitioner was deprived of his freedom of action in any significant way." (App. 19).

The courts below denied petitioner his right to *de novo* review of his petition for writ of habeas corpus in direct contravention of this Court's decision in *Lindh v. Murphy*, 521 U.S. 320 (1997), that "[T]he new provisions of chapter 153 generally apply only to *cases* filed after the Act became effective." *Id.* at 320. Petitioner's pro se habeas petition, raising Constitutional claims which the district court refused to review *de novo*, was filed months before the AEDPA was signed into law. (App. 46). Although petitioner filed a first and second amended petition after the effective date of the AEDPA,[4] his *case* was on file well before April 24, 1996.

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[4] It is petitioner's position that the amended petitions "relate back" to the original pro se petition under Fed.R.Civ.Pro. 15(c)(2).

The district court's decision repeatedly measures petitioner's claims according to whether the state court's decision was "reasonable." In refusing to review the decision of the district court, the court below overlooked the material legal principle that "[i]t is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." *Schlup v. Delo*, 513 U.S. 298, 130 L.Ed.2d 808, 840 (1995) (O'Connor, J., concurring), citing *Cooter and Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

By applying a deferential standard of review to petitioner's petition, the district court violated its duty to adjudicate constitutional issues. "If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and *the reality* of control by Article III judges over the *interpretation, declaration, and application of federal law.*" *Pacemaker Diagnostic Clinic of America, Inc. v. Instro-Medix*, 725 F.2d 537, 544 (9th Cir.) (*en banc*), *cert. denied*, 496 U.S. 826 (1984). This Court has repeatedly "stated quite clearly that 'mixed questions or the application of constitutional principles to the facts as found *leave the duty of adjudication with the federal judge.*' " *Wright v. West*, 505 U.S. 277 (1982) (O'Connor, concurring), citing *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (emphasis added). Justice O'Connor gave numerous examples of this principle in various contexts:

> In *Townsend v. Sain*, 372 U.S. 293 (1963), we again said that "although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently." *Id.*, at 318.
>
> In *Neil v. Biggers*, 409 U.S. 188 (1972), we addressed *de novo* the question whether the state court pretrial identification procedures were unconstitutionally suggestive by using the same standard used in cases on direct appeal:

" 'a very substantial likelihood of irreparable misidentification.' " *Id.*, at 198 (quoting *Simmons v. United States*, 390 U.S. 377 (1968)).

In *Brewer v. Williams*, 430 U.S. 387 (1977), we reviewed *de novo* a state court's finding that a defendant had waived his right to counsel. We held that "the question of waiver was not a question of historical fact, but one which, in the words of Mr. Justice Frankfurter, requires 'application of constitutional principles to the facts as found. . . . ' " *Id.*, at 403 (quoting *Brown v. Allen*, 344 U.S. at 507 (opinion of Frankfurter, J.)). We then employed the same legal analysis used on direct review. 430 U.S. at 404.

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), we explicitly considered the question whether the Court of Appeals had exceeded the proper scope of review of the state court's decision. *Id.*, at 341. We concluded that because the issue presented was not one of historical fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d), the Court of Appeals was correct in reconsidering the state court's "application of legal principles to the historical facts of this case." 446 U.S. at 342. Although we held that the Court of Appeals had erred in stating the proper legal principle, we remanded to have it consider the case under the same legal principles as in cases on direct review. *Id.*, at 345-350.

In *Strickland v. Washington*, 466 U.S. 668 (1984), we held that "the principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. . . . No special standards ought to apply to ineffectiveness claims made in habeas proceedings." *Id.*, at 697-698. We distinguished state court determinations of mixed questions of fact and law, to which federal courts should not defer, from

> state court findings of historical fact, to which federal courts should defer. *Id.*, at 698.
>
> Finally, in *Miller v. Fenton*, 474 U.S. 104 (1985), we recognized that "an unbroken line of cases, coming to this Court both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, forecloses the Court of Appeals' conclusion that the 'voluntariness' of a confession merits something less than independent federal consideration." *Id.*, at 112.

Wright v. West, at 301-02. Justice O'Connor concluded, "We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." *Id.* at 305.

The record demonstrates that the courts below shirked their duty to perform an independent adjudication of the constitutional questions raised by Mr. Middleton in his petition for writ of habeas corpus, contrary to this Court's decisions in *Lindh v. Murphy*, 521 U.S. 320 (1997), and *Wright v. West*, 505 U.S. 277 (1982).

II.

PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE VIOLATED BY THE USE IN EVIDENCE OF STATEMENTS HE MADE IN RESPONSE TO AN UN-MIRANDIZED CUSTODIAL INTERROGATION.

Police officers repeatedly and persistently questioned Mr. Middleton at the scene of his wife's death, in an ambulance as he was taken to a local hospital, and again at the hospital, without advising him of his rights under *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Police officers and paramedics described his condition as ranging from distraught to hysterical at the time. Although he denied killing his wife in all of his statements, they were introduced against him at his trial, and inferences of guilt were drawn from alleged inconsistencies between his

various declarations. Petitioner unsuccessfully moved to suppress the statements, and the Missouri Court of Appeals affirmed, finding that petitioner was not in custody when he was questioned, and that *Miranda* therefore did not apply.

Petitioner asserted his *Miranda* claim in his pro se and amended petitions for writ of habeas corpus. (App. 11). The district court took note of this Court's holding that the issue of whether a suspect is "in custody" is a mixed question of law and fact, subject to *de novo* federal review, with no duty of deference to a state court's custody determination. *Thompson v. Koehane*, 516 U.S. 99 (1995). (App. 11). Nevertheless, the district court then merely rubber-stamped the state court's determination that petitioner was not in custody when he was subjected to interrogation without the benefit of the warnings mandated by *Miranda*.

After quoting extensively from the state court opinion, the district court's substantive decision on the merits of this question was laid out in two sentences:

> The record in the case at bar does not reflect that petitioner was taken into custody *or deprived of his freedom in any significant way by the police*. The circumstances surrounding petitioner's interrogation do not establish that a reasonable person would have felt that he was not *at liberty to terminate the interrogation*.

(App. 19). In so disposing of the claim, the district court misstated both the record and the law.

This Court has long made clear that custody occurs when a person has been formally arrested or is otherwise deprived of his freedom of action in any significant way. *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984). In making this assessment, the court must examine the totality of the circumstances surrounding the interrogation and assess "how a reasonable man in the suspect's shoes would have understood his situation." *Id.* at 442; *United States v. Helmel*, 769 F.2d 1306, 1320 (8th Cir. 1985); *Stansbury v. California*, 114 S. Ct. 1526, 1528 (1994). The district court's

statement that the record reflects that Mr. Middleton was "not deprived of his freedom in any significant way by the police," (App. 19), is indefensible in light of state court fact findings that police officers detained and searched Mr. Middleton at gunpoint at their initial encounter, and thereafter kept him under constant armed escort, physically restrained his movements, subjected him to involuntary tests, and forcibly removed his boots and clothing. (App. 11-19).

The evidence establishes that petitioner's freedom was significantly restricted when he was questioned. The state court record reflects Officer John Gale, the first to respond to petitioner's 911 call, (App. 3), approached him with his gun drawn and began issuing orders to Mr. Middleton. (Trial Tr. 39, 43). Although Petitioner was subjected to a patdown search by Officer Spartz as he was questioned by Gale (App. 4) Middleton was not warned of his *Miranda* rights prior to questioning. (Trial Tr. 44).

After the patdown search Middleton said that he was going to be sick, and headed toward his bathroom. Gale and Spartz followed him into the bathroom. (Trial Tr. 42, 53). When Middleton splashed water on his face, Gale ordered him to take his hands out of the water, and "finally had to pull him out" of the bathroom. (App. 5). (Trial Tr. 43, 165). At this point, Gale "gave Middleton over to Spartz," (Trial Tr. 50), who escorted Mr. Middleton into the garage and again interrogated him without *Miranda* warnings. (Trial Tr. 63). Mr. Middleton made another statement indicating that the shooting was accidental. (Trial Tr. 167).

Paramedics examined Mr. Middleton and observed elevated blood pressure, transient chest pains, and hyperventilation. Paramedics urged him to go to the hospital. (App. 5-6). Before the ambulance departed, Mr. Middleton was forcefully subjected to a gun powder residue test. Mr. Middleton attempted to resist, and a paramedic helped officers administer the test by holding Mr. Middleton's hands. (Trial Tr. 237-38). Spartz was ordered to seize Petitioner's clothing and boots upon arrival at the

hospital. (Trial Tr. 172-73). Spartz then accompanied Mr. Middleton in the ambulance. (App. 6).

While en route to the hospital, Spartz interrogated Petitioner a third time, again without *Miranda* warnings. (Trial Tr. 63-64). Soon after Mr. Middleton began his explanation, he became unresponsive, appearing to pass out. (App. 6). At the hospital, Spartz posted guards outside Mr. Middleton's room until he was able to resume his interrogation. (Trial Tr. 182). When Mr. Middleton began to respond to hospital personnel, Spartz seized his clothing and boots from him, and then interrogated Petitioner a fourth time without *Miranda* warnings. (App. 6-7), (Trial Tr. 63). Thus, the district court's statement that the evidence fails to show that petitioner was "deprived of his freedom in any significant way by the police," (App. 19), is flatly refuted by evidence, credited by the state court that petitioner's un-Mirandized statements were taken when he had been stopped at gunpoint, searched, placed under armed guard, physically restrained from using the bathroom in private, forcibly subjected to gunshot residue tests and, finally, deprived of his clothing.

The error in the district court's analysis is obvious when one considers the fact that Mr. Middleton's statements are arguably involuntary as a matter of due process, independent of the failure of police to issue *Miranda* warnings. The evidence supports a finding of involuntariness under a number of decisions of this Court collected in a recent opinion by Justice O'Connor:

> Under the due process approach, as we have already seen, courts look to the totality of circumstances to determine whether a confession was voluntary. Those potential circumstances include not only the crucial element of police coercion, *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); the length of the interrogation, *Ashcraft v. Tennessee*, 322 U.S. 143, 153-154 (1944); its location, *see Reck v. Pate*, 367 U.S. 433, 441 (1961); its continuity, *Leyra v. Denno*, 347 U.S. 556, 561

> (1954); the defendant's maturity, *Haley v. Ohio*, 332 U.S. 596, 599-601 (1948) (opinion of Douglas, J.); education, *Clewis v. Texas*, 386 U.S. 707, 712 (1967); physical condition, *Greenwald v. Wisconsin*, 390 U.S. 519, 520-521 (1968) (*per curiam*); and mental health, *Fikes v. Alabama*, 352 U.S. 191, 196 (1957). They also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation. *Haynes v. Washington*, 373 U.S. 503, 516-517 (1963); Brief for United States as Amicus Curiae 19, n. 17; *see also Schneckloth, supra*, at 226 (discussing factors).

Withrow v. Williams, 507 U.S. 680, 693-694 (1995). The circumstances with respect to Mr. Middleton's third statement, which was taken from his hospital bed while he was on an EKG with IV tubes running into his arms, are remarkably similar to those in *Mincey v. Arizona*, 437 U.S. 397 (1978), where this Court ruled that a defendant was in custody, and his statements were involuntary, where he was interrogated while confined to a hospital bed.

The district court's opinion, which the Court of Appeals refused to review, applies the wrong test for determining the admissibility of petitioner's statements. The only relevant finding of the district court is that "a reasonable person would have felt that he was not *at liberty to terminate the interrogation.*" (App. 19). Totally absent from the decision of the district court is any mention of the key component of the test for determining "custody," which is whether a reasonable person would feel that, at the time of questioning, he was free to leave. *See Thompson v. Koehane*, 516 U.S. 99, 112, 116 (1995) (remanding case for determination whether defendant was "in custody" at time of confession, based on whether a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation *and leave*"). The record and findings of the state court in this case establish clearly that Mr. Middleton did not have a reasonable

expectation of liberty, and was "in custody" for purposes of applying *Miranda*'s mandate:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to question; (4) either strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning.

United States v. Griffin, 922 F.2d 1343, 1352 n.12 (8th Cir. 1990).[5] *Accord, McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987).

Under these criteria, petitioner was clearly in custody when he was questioned. Officers never advised Middleton that he was free to leave. Middleton was not allowed "unrestrained freedom of movement during questioning." Quite the opposite, he was detained at gunpoint, escorted by armed officers, and physically restrained against his will by the overwhelming superior force of officers. The police took firm control of the interrogation site and "dictate[d] the course of conduct followed by the [suspect]." *United States v. Jones*, 630 F.2d 613, 616 (8th Cir. 1980). Officers forced petitioner to submit to gunshot residue tests against his will – conduct which indisputably constitutes a "seizure," even under

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[5] It is not necessary that each of these indicia be present in order for a suspect to be "in custody." In fact, a particularly strong showing with respect to one of the first three factors may compensate for a deficiency with respect to the other factors. *Griffin*, 922 F.2d at 1349.

the reckoning of Missouri courts. *See, e.g., State v. Howell*, 524 S.W.2d 11 (Mo. banc 1975). "Where the conduct of the police leads a suspect to believe that the police have taken full control of the scene, then we are more likely to recognize the existence of custody." *Griffin*, 922 F.2d at 1352.[6]

Additionally, the initial contact between petitioner and the police – in which Officer Gale drew down on him with a weapon, searched him, and initiated questioning – is strongly indicative of custody. "When the confrontation between the suspect and the criminal justice system is instigated at the direction of law enforcement authorities, rather than the suspect, custody is more likely to exist." *Griffin*, 922 F.2d at 1351. The state court finding fails to address any of these factors, which are an integral part of the constitutional analysis of a citizen's fifth amendment rights. There is ample evidence to establish that Mr. Middleton was in custody during each questioning session.

In finding that a person's "liberty to terminate questioning" was sufficient to resolve the question of whether Mr. Middleton's interrogation was "custodial" for purposes of *Miranda*, the district court ignored the underpinnings of *Miranda* itself that "without proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. Recently, this Court reiterated the effect of *Miranda*, stating that "[u]nless the prosecution can demonstrate the warnings and waiver as threshold matters, we held, it

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[6] Although Petitioner's interrogation occurred in his home "it is not difficult to envision that a suspect's sense of captivity can actually be intensified by the intrusive and intimidating environment created when agents of the law take control of a person's private residence. After all, a person cannot reasonably expect to be free anywhere if not within the refuge of his home." *Id.* at 1355. *See also Orozco v. Texas*, 394 U.S. 324 (1969) (police dominated interrogation in suspect's home custodial).

may not overcome an objection to the use at trial of statements obtained from the person in any ensuing custodial interrogation. *Withrow v. Williams*, 507 U.S. at 689.

The refusal of the district court to independently review Mr. Middleton's Fifth Amendment claim, the district court's erroneous declaration of the record and the law in resolving this issue, and the refusal of the Court of Appeals to hear Mr. Middleton's appeal warrant exercise of this Court's supervisory power. Certiorari should be granted to review the issue of whether the courts below should have independently adjudicated Mr. Middleton's *Miranda* claim. U.S.S.Ct.R. 10(a) & (c).

III.

THE DISTRICT COURT ERRONEOUSLY APPLIED A PROCEDURAL BAR TO CLAIMS AND EVIDENCE BECAUSE THE STATE COURT EXPLICITLY REACHED THE MERITS, WITHOUT RELYING ON ANY ARGUABLY APPLICABLE PROCEDURAL BAR GROUNDS, AND BECAUSE THE PROCEDURAL AND FACTUAL BARS IN QUESTION RESULTED BECAUSE OF TRIAL AND APPELLATE COUNSEL'S INEFFECTIVENESS.

The district court denied several of petitioner's claims on procedural grounds. (App. 28-36). In so doing, the court overlooked the ruling of the Missouri Court of Appeals on petitioner's motion to recall the mandate explicitly reaching the merits of petitioner's motion. In response to petitioner's pro se inquiry, the Missouri Court of Appeals replied:

> The entire court reviewed your motion to recall the mandate. *Your motion was reviewed on the merits* and denied by the entire court.

Petitioner's Exhibit 10, Letter of Missouri Court of Appeals Staff Counsel, January 20, 1997. No procedural bar exists where the state court by-passes potential procedural barriers and reaches the merits of the petitioner's constitutional claims. *Harris v. Reed, supra; County Court of*

Ulster v. Allen, 442 U.S. 140 (1979); *Simpson v. Camper*, 927 F.2d 392 (8th Cir. 1991).

Petitioner also asserted cause and prejudice, in the form of ineffective assistance of trial/appellate counsel, to overcome the state's claim of procedural bar. The district court concluded that appellate counsel could rely on trial counsel's failure to properly preserve claims for appellate review, ignoring the fact that appellate counsel and trial counsel in this case were one and the same. (App. 41). In essence, the court ruled that because trial counsel failed to object, however negligent, appellate counsel's failure to brief the claims was justified, and that this failure now bars federal enforcement of petitioner's constitutional rights. (App. 41-42). This reasoning overlooks the nature of the procedural bar doctrine – that the federal court will respect a state procedural bar only if it is an independent, adequate ground for avoiding the constitutional issue. Where the basis for the state court decision is the ineffectiveness of trial counsel, the procedural bar is neither independent of nor adequate to bar federal enforcement of petitioner's right to effective assistance of trial and appellate counsel. "The right to effective assistance of counsel is not confined to trial, but extends to the first appeal as of right." *Kimmelmann v. Morrison*, 477 U.S. 365, 378, n.2 (1986), citing *Evitts v. Lucey*, 469 U.S. 387 (1985).

The court below further overlooked appellate counsel's conflict of interest arising from his deficient performance as trial counsel and his failure to advise petitioner that he was facing criminal prosecution and disbarment at the time of his representation of petitioner. Trial counsel's continued representation of Mr. Middleton on appeal, which involved issues of his ineffectiveness, was improper because of his personal interest in not being found ineffective. *State v. Powell*, 798 S.W.2d 709 (Mo. banc 1993). California, which has a similar process combining direct and "postconviction" review, prohibits trial counsel from representing convicted defendants on appeal for obvious reasons:

> We believe there is an inherent conflict when appointed trial counsel in a criminal case is also appointed to act as counsel on appeal. We therefore discourage the practice of allowing such appointments even when, as here, the client signs a declaration under penalty of perjury that he does not believe " . . . there is any reason for another lawyer to review the records of my case . . . "

People v. Bailey, 9 Cal. App. 4th 1252, 1254, 12 Cal. Rptr. 339 (1992). Where a procedural bar of an ineffective assistance of counsel claim is occasioned by trial counsel, that bar is not "independent" of the constitutional claim. *See, e.g., Dawan v. Lockhart*, 980 F.2d 470 (8th Cir. 1992). The Eleventh Circuit has ruled that where issues of ineffective assistance of counsel are litigated in tandem with direct appeal issues, the petitioner has a constitutional right to counsel in those proceedings. *Williams v. Turpin*, 87 F.3d 1204, 1210 (11th Cir. 1996) (finding a constitutional right to counsel in Georgia's unified appeal system).

The courts below overlooked the fact that under Missouri law, appellate counsel saddled with a conflict of interest, even one arising from his incompetence during Rule 29.15 proceedings, can excuse a prisoner's failure to timely present claims in a Rule 29.25 proceeding. In *State v. Reuscher*, Mo. Sup. Ct. No. 73463 (Order filed December 1, 1995) (unpublished) (Appendix to Traverse, Exhibit 7), the same attorney, Robert Duncan, was found ineffective and the prisoner was granted relief, in spite of the identical procedural bar invoked here, because Duncan had a conflict of interest which included his failure to assert Reuscher's rights under Rule 29.15. (*See* Exhibits 7, 8 and 9 filed with Petitioner's Traverse). Thus, the bar under Rule 29.15 is not rationally and consistently applied to litigants under similar circumstances, and is not adequate to bar federal review. *Ford v. Georgia*, 498 U.S. 411 (1991).

Had the district court correctly resolved the procedural issues, it would have reached the merits of Middleton's claims of ineffective assistance of counsel. At the

time of petitioner's trial, Robert Duncan was experiencing severe personal and financial difficulties that eventually led to his conviction for income tax evasion and disbarment. Duncan failed to conduct a reasonable investigation into the state's case, in violation of *Strickland v. Washington*, 466 U.S. 668 (1984). He made no opening statement and presented no theory of defense to the jury.

Petitioner was prejudiced because there is persuasive medical evidence explaining petitioner's behavior before, during and after the death of his wife in a manner consistent with his innocence. When Mrs. Middleton died by gunshot in the dining room of her home, only she and petitioner were present. Petitioner made several statements giving allegedly inconsistent explanations – that he dropped the gun and it went off, and that he was handing his wife the gun and "blacked out." Although Mr. Middleton said he was ill, and acted ill when officers and paramedics arrived at the scene, the state inferred guilt by repeatedly injecting lay opinions that he was faking it. (Tr. Trans. at 54, 56-57, 59, 79). A reasonable investigation would have revealed that Petitioner has grand mal epilepsy and that he was experiencing related hyperventilation, stress, and emotional trauma at the time of the incident. Hospital records indicate that Petitioner was making jerking movements, had white foamy saliva on his mouth, and could not respond to hospital personnel for nearly an hour. Michelle Brockman, Petitioner's niece, who lived with the Middleton's at the time, would have testified that Mr. Middleton was not feeling well the evening prior to the shooting, and that Mr. and Mrs. Middleton had a good relationship. This evidence would have supported petitioner's persistent claims of innocence in his wife's death.[7]

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[7] The Missouri Court of Appeals rejected this claim because the records themselves were not in evidence, so the court erroneously concluded that "the medical evaluation in no way counters or nullifies the state's strong evidence at trial

The State also inferred guilt from petitioner's alleged failure to cry over the death of his wife. (*See, e.g.*, Tr. Trans. at 110, 184, 226-27, 295). In closing argument, the prosecutor argued that Mr. Middleton was guilty because he was not grieving for his wife. (Tr. Trans. at 546). Again, hospital records indicate that Petitioner was crying and was diagnosed with "grief reaction with depression" and transferred to Comprehensive Mental Health Services at Independence Regional Hospital for treatment and medication. Independence Regional Medical Center records described Middleton as "tearful. Mood depressed. Affect flat." Western Missouri Mental Health Center physicians found that petitioner suffered from adjustment disorder, post-traumatic stress disorder, and grief reaction immediately following his wife's death. (Traverse Exh. 1, 2 & 3).

Duncan was also ineffective for failing to move to suppress items taken from Middleton's home pursuant to a warrantless search, including a gun cleaning kit, boots, clothing, and sections of wall that were removed and introduced into evidence. These items were seized hours after paramedics had removed Mr. and Mrs. Middleton from the home. There were no exigent circumstances to justify the warrantless search. Nevertheless, trial counsel did not move to suppress the evidence, object to its admission, or brief the issue on appeal. The opinion of the district court is therefore inconsistent with *Mincey v. Arizona*, 437 U.S. 385 (1978) and *Kimmelmann v. Morrison*, 477 U.S. 365 (1986).

These and other issues were rejected without considering evidence and claims that the Missouri Court of Appeals carefully "reviewed on the merits . . . by the

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regarding Movant's physical condition after the incident." (App. 26). Petitioner's documented history of grand mal epilepsy would have done just that, in addition to providing persuasive corroboration of Mr. Middleton's statements that he "blacked out" before the gun discharged.

entire [Missouri Court of Appeals]." Petitioner respectfully suggests that the refusal of the courts below to exercise jurisdiction over Mr. Middleton's constitutional claims presents important questions warranting discretionary review by this Court. Rule 10(a)(c).

IV.

THE COURT OF APPEALS ERRED IN DETERMINING THAT PETITIONER, WHO FILED HIS HABEAS CORPUS PETITION BEFORE THE 1996 AMENDMENTS TO 28 U.S.C. § 2253 AND § 2254, WAS REQUIRED TO OBTAIN A CERTIFICATE OF PROBABLE CAUSE, RATHER THAN A CERTIFICATE OF APPEALABILITY, BEFORE PROCEEDING IN THE COURT OF APPEALS.

Notwithstanding this Court's ruling in *Lindh v. Murphy*, 521 U.S. 320 (1997), the Eighth Circuit Court of Appeals requires all prisoners seeking appellate review of the denial of habeas corpus relief to obtain a certificate of appealability ("COA") under the standard set out in revised 28 U.S.C. § 2253(c)(2), even where, as here, the petition for writ of habeas corpus was filed well before April 24, 1996. *Tiedeman v. Benson*, 122 F.3d 518 (8th Cir. 1997).[8] Applying that standard, the United States District Court and the Court below denied petitioner a COA in spite of meritorious constitutional claims and the district court's application of a highly questionable procedural bar. This case therefore presents the question of whether

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[8] *Tiedeman* seizes on the word "generally" in one sentence from *Lindh*, 521 U.S. at 336, as limiting this Court's decision in *Lindh* to the specific amendment before this Court in Mr. Lindh's case. On this basis, *Tiedeman* proceeds to examine whether the "certificate of appealability" requirement is "procedural" or "substantive," and whether it is within the *policy* of the section of the Act that this Court held to imply nonretroactivity of the habeas corpus limitations other than those in chapter 154. 122 F.3d at 552-53.

the COA requirement of § 2253(c)(2) applies to prisoners who file a petition for habeas corpus relief under 28 U.S.C. § 2254 prior to April 24, 1996.

The Eighth Circuit Court of Appeals stands alone in ruling that a prisoner who filed his petition for writ of habeas corpus prior to April 24, 1996, must obtain a COA, rather than a certificate of probable cause (CPC) to appeal. "[R]egardless of when the notice of appeal was filed, if a §§ 2254 or 2255 petition was filed in the district court before AEDPA's effective date, no certificate of appealability is required." *United States v. Kunzman*, 125 F.3d 1363 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 1375 (1998); *also see, Crowell v. Walsh*, 151 F.3d 1050, 1052 (D.C. Cir. 1998) ("Accordingly, we join every circuit (apart from the Eighth) to address the question after *Lindh* in holding that § 2253(c) does not apply to appeals of habeas petitions filed before the effective date of the Act."); *Martin v. Bissonette*, 118 F.3d 871 (1st Cir. 1997); *United States v. Perez*, 129 F.3d 255 (2d Cir. 1997)[9]; *United States v. Skandier*, 125 F.3d 178 (3d Cir. 1997)[10]; *United States v. Roberts*, 118 F.3d 1071 (5th Cir. 1997); *Arredondo v. United States*, 120 F.3d 639 (6th Cir. 1997); *Reddick v. Haws*, 120 F.3d 714 (7th Cir. July 22, 1997); *Naddi v. Hill*, 106 F.3d 275, 277 (9th

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[9] In *Perez*, the Second Circuit relied in part on this Court's citation of *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996) (*en banc*), *cert. denied*, 117 S. Ct. 1695 (1997), as one of the cases creating the conflict that it granted certiorari in *Lindh* to resolve. *Lindh v. Murphy*, 521 U.S. at 324. The Second Circuit explained that *Hunter* "addressed the precise question before us." It reasoned: "The Court's reference to *Hunter* strongly indicates that it intended to address the retroactivity of all of the new chapter 153 provisions enacted in the AEDPA." 129 F.3d at 260.

[10] The Third Circuit reasoned in *Skandier*, "[t]he essential message of *Lindh* . . . is that [other courts] need not resort to a *Landgraf* analysis with its default rules of retroactive/prospective application when the intent of Congress is clear and no Constitutional violation would be worked by applying the statute as Congress intended."

Cir. 1997); *Hardwick v. Singletary*, 126 F.3d 1312 (11th Cir. 1997) (*per curiam*).[11]

Some courts have opined that the distinction between a COA and CPC is unimportant because of the similarity in the substantive standard for permitting a habeas petitioner to proceed with an appeal. The pre-AEDPA certificate of probable cause required a petitioner to make a "substantial showing of a denial of [a] *federal* right." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (emphasis added). Under the AEDPA, a certificate of appealability may be issued only where the applicant has made a "substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253(c)(2) (emphasis added). Those standards have been described as nearly identical,[12] and the Court below has relied upon their similarity to justify application of § 2253(c)(2) in contravention of *Lindh*. *Tiedeman v. Benson*, 122 F.3d 518 (8th Cir. 1997) ("The parties to this case agree that the new provisions with respect to certificates of appealability made no substantive change in the standards by which applications for such certificates are governed").

The practice of the Eighth Circuit Court of Appeals, however, reveals that the difference in the standards *do* make a difference. The court below again stands alone in

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[11] Since its decision in *Lindh*, this Court has on two occasions summarily vacated cases in which the court below had denied COA where the petition was filed before the effective date of AEDPA, and remanded for reconsideration in light of *Lindh*. *Fretwell v. Norris*, 521 U.S. 1115 (1997); *Dickey v. United States*, 118 S. Ct. 2365 (1998). These cases should have alerted the court below to the discrepancy between its policy and this Court's authoritative construction of AEDPA.

[12] "Notwithstanding a marginal variance in the language identifying the necessary showing with respect to certificates of probable cause and appealability, we conclude that the standard governing certificates of probable cause and certificates of appealability is materially identical." *Hardwick v. Singletary*, 126 F.3d 1312 (11th Cir. 1997) (*per curiam*).

giving the COA provision of the AEDPA an interpretation more restrictive of a prisoner's right to appeal, finding that the AEDPA's use of "constitutional right," as opposed to "federal right," more restrictive. In denying a COA to a prisoner raising a claim under *Bailey v. United States*, 516 U.S. 137 (1995), the Court below reasoned that "the petitioner is not making a constitutional claim: He is making a claim to a federal statutory right." *Hohn v. United States*, 99 F.3d 892, 893 (8th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1969 (June 15, 1998). *Also see United States v. Apker*, 101 F.3d 75 (8th Cir. 1996), finding the distinction between a "federal" right and a "constitutional" right to be controlling on the issuance of a COA under the AEDPA.

The Eighth Circuit's application of a stricter standard is also evidenced in its rulings on attempts by habeas petitioners to appeal. The success rate for prisoners seeking an appeal from the Eighth Circuit Court of Appeals has plummeted since the enactment of the AEDPA. Under the prior standard, no prisoner under sentence of death was refused a CPC to appeal the denial of a habeas petition in the court below. Applying revised § 2253(c), the Eighth Circuit has refused a COA with respect to any issue in *Samuel Smith v. Bowersox*, 98-3163 (8th Cir. September 8, 1998); *Darrell Mease v. Bowersox*, 97-2771 (8th Cir. December 12, 1997); *Milton Griffin-El v. Bowersox*, 96-3678 (8th Cir. June 4, 1997); and *Cox v. Norris*, 133 F.3d 565 (8th Cir. 1997). These orders denying leave to appeal on any issue in a first habeas corpus proceeding in a capital case are unprecedented in the Eighth Circuit under the standard for granting a CPC. Clearly, applications for the required leave to appeal are being scrutinized more harshly by the court below under the revised standard, and in some cases the revised § 2253 has been relied upon to deprive habeas petitioners of unrestricted CPC's properly issued by district courts. *See, e.g., Milton Griffin-El v. Bowersox, supra,* (vacating CPC issued by district court and denying COA); *Roberts v. Bowersox*, No.

96-3789 (Eighth Circuit refused to accept district court CPC issued before April 24, 1996).

In this case, petitioner requested the issuance of a COA or CPC to obtain review of issues dealing with federal and state doctrines of Missouri procedural bars. Because the court below did not explain its denial of Middleton's application, nor did the district court, it is impossible to tell whether Middleton's application for COA/CPC was denied based on the Eighth Circuit's more restrictive interpretation of the standard for a COA, as articulated in *Hohn v. United States*, 99 F.3d 892, 893 (8th Cir. 1997).

In holding that the Anti-terrorism and Effective Death Penalty Act's "certificate of appealability" requirement applies to petitioners who filed their petitions before its effective date, but who seek to appeal after its effective date, the court below has *both* entered a decision in conflict with ten other United States courts of appeals *and* decided an important question of federal law in a way that conflicts with this Court's decision in *Lindh v. Murphy*, 521 U.S. 320 (1997). Petitioner respectfully suggests that the Eighth Circuit's departure from the practice of every other circuit, and from this Court's decision in *Lindh*, presents important question warranting review by this Court. Rule 10(a)(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Page

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3009WMKC

Kenneth G. Middleton,	*	
	*	
Appellant,	*	Appeal from the United
	*	States District Court for
v.	*	the Western District of
	*	Missouri
Michael Bowersox,	*	
Superintendent,	*	
	*	
Appellee.	*	

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied.

The motion for leave to proceed in forma pauperis has been considered and is also denied. The appeal is dismissed.

January 25, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KENNETH MIDDLETON,	)	
Petitioner,	)	**Case No. 95-1302-CV-W-4**
vs.	)	(Filed April 29, 1998)
MICHAEL BOWERSOX,	)	
Respondent.	)	

ORDER DENYING PETITIONER'S SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Kenneth Middleton, is currently incarcerated in the Potosi Correctional Center, located at Mineral Point, Missouri, pursuant to the judgment and sentence of the Circuit Court of Jackson County, Missouri. Petitioner was convicted of the felony of first degree murder, § 565.020, RSMo, the felony of armed criminal action, § 571.015, RSMo, and was sentenced to concurrent terms of imprisonment of life without the possibility of parole and 200 years respectively. Respondent, Michael Bowersox, Superintendent of the Potosi Correctional Center, is petitioner's current custodian and thus is a proper party respondent. 28 U.S.C. § 2254, Rule 2(a).

I.

In his first ground for relief petitioner alleges that the evidence was not sufficient to support his conviction for first degree murder. Petitioner alleges that the evidence

presented neither established that a murder was committed nor that if a murder was committed that petitioner committed the murder after deliberation. The Missouri Court of Appeals rejected this claim on the merits with the following analysis:

> The evidence presented to the jury, stated favorably to the verdict, showed that on February 12, 1990, Katherine Middleton was at work at AT&T in Lee's Summit, Missouri, when she received a phone call from her husband, the defendant, who complained of illness. She left work and drove home.
>
> Approximately twenty minutes later, at 1:52 p.m., the 9-1-1 dispatcher received a call from the defendant requesting an ambulance. The defendant told the dispatcher, "A gun just went off and hit my wife . . . [i]n the side of the head." Within three minutes, a second call was received by the 9-1-1 operator. The caller told the 9-1-1 operator, "There wasn't supposed to be anything in it. Oh god." While they conversed, police officer John Gale arrived at the Middleton residence located in Blue Springs, Missouri.
>
> As Officer Gale arrived, the defendant came out of the house appearing "real frantic," which caused the officer to draw his gun. The defendant was yelling and asking were [sic] the paramedics were. When Officer Gale realized the defendant was unarmed, he holstered his gun and asked the defendant what had happened. The defendant did not answer, but instead kept yelling, "Where are the paramedics?"
>
> It was a bright, sunny day but the blinds in the house, which were almost always open,

were drawn and the inside of the house was dark. Upon entering the house, Officer Gale looked into the dining room and saw the victim, Mrs. Middleton, lying in a pool of Blood on her right side. She had a bullet wound above her left eye with an exit wound on the right side of her head. He testified that it was apparent she had not been breathing for several minutes.

When Officer Gale returned to the defendant in the living room, he tried to determine what had happened. He asked if his wife had committed suicide, and the defendant replied that she had not. The defendant explained that he had been sick and had called his wife home from work. While he waited for her, he was cleaning his Smith & Wesson .357 Magnum. He explained that when his wife got home, she picked up the gun, started to walk to the other room, dropped the gun and it went off.

Officer Spartz and Sergeant Collier arrived about this time and observed the .357 Magnum lying on an ottoman. The defendant said he had picked it up and placed it there. One officer inspected the gun and found five shells and one empty cylinder. The firing pin was depressed on one of the shells, indicating that it had been fired. The bullets were jacketed, hollow-point shells, designed to "mushroom back" or expand when they enter the target.

Because the defendant was acting "explosive," Officer Spartz hid the gun behind the television set. The defendant appeared agitated, continuing to yell and flail his arms. This activity caused the officer to pat him down to make sure he did not have another weapon. Immediately following the pat down, the defendant acted surprised, became rigid, and screamed

that he was going to be sick. He ran down the hallway to the bathroom. Officer Spartz followed him and saw that he was washing his hands in the sink. Both Spartz and Gale twice told the defendant to get his hands out from under the water. They finally had to pull him out. The officers did not see the defendant vomit or stand over the toilet. They did see him spit saliva into the sink.

The defendant used a hand towel to dry his hands. Officer Spartz took the defendant outside to the garage and tried to calm him down and asked him to explain exactly what happened. The defendant repeated what he had said before, except in more detail. He told the officer he had taken some pills that morning for an infection, and began sweating and feeling ill. He called his wife to come home from work and when she arrived, she told him he looked ill and said she was going to call the doctor. She took the gun the defendant was cleaning and as she walked to the telephone, she dropped the weapon. The defendant explained that when the gun fell to the floor it went off in her face. At this point, the defendant threw up his hands and banged them against the garage door.

During the time the defendant was outside with Officer Spartz, Officer Gale looked for some indication that the defendant had been cleaning his gun. He found no evidence substantiating defendant's explanation, except for a towel upstairs. He later found a gun box and some brushes in the basement.

Paramedics Keebaugh and Wedlock arrived and determined the defendant was hyperventilating, complaining of chest pains, and his

blood pressure was slightly elevated. They convinced the defendant to allow them to transport him to the hospital for an examination. As the paramedics prepared to transport him, the defendant reached his hands into a flower planter and began rubbing his hands in the dirt. At some point after this and before the defendant was taken to the hospital, the police performed a paraffin test on his hands.

Officer Spartz rode in the ambulance with the defendant and again asked him " . . . to be clear as to what exactly had happened in the house." The defendant narrated the events up to the point where his wife was walking to the telephone. He abruptly stopped and closed his eyes in a manner described by the officer as "squinting" and appeared unconscious. This surprised the paramedic and caused him to perform some tests to determine defendant's medical condition. When the ambulance arrived at St. Mary's Hospital in Blue Springs, the defendant continued to appear unconscious.

Officer Spartz positioned himself at the nurses' station and was able to observe the defendant in his room. When no one was in the room, the defendant would open his eyes and look around, but when someone came in, he would shut them. Eventually, he began to interact with hospital personnel. The police officer went into the room and the defendant agreed to resume telling the events that had taken place earlier that day. On this occasion, he described the death of his wife as follows: She came in and told him she was going to call the doctor and went to the telephone. He was sitting in the chair wiping his gun off when he got up to hand

her the gun. He related that he was unsure whether he "fell back or what," but he next work up on the floor. His wife was lying on the floor.

An autopsy showed that Mrs. Middleton was 5'6" and weighed 128 pounds, and had a single gunshot wound to the head, which the medical examiner testified was the cause of death. The entry point was above the left eye, 3½" below the top of her head. The exit point was on the right side, 2½" below the top of her head. There was a prominent area of powder stippling, *i.e.*, small dots, present around the left side of her face over an area measuring 4½" x 4".

The medical examiner testified to multiple contusions on her upper chest, which were caused by a blunt trauma. The bruises were described by the examiner as consistent with someone of the defendant's size (6 feet tall, 200 pounds) "grabbing the woman by the blouse and pressing her against a wall."

The defendant complains that the evidence was not sufficient to sustain the convictions, that the police failed to warn him of his *Miranda* rights, and requests plain error review of the admissions of certain evidence and instructional errors. Finally, the defendant advances his Rule 29.15 claim of ineffective assistance of counsel.

On the question of the sufficiency of the evidence, the defendant argues that the evidence did not exclude the "possibility" of an accidental shooting or suicide, citing *State v. Priest*, 660 S.W.2d 300 (Mo. App. 1983), and *State v. Black*, 611 S.W.2d 236 (Mo. App. 1980). The defendant argues that the state could not make a

submissible case and therefore, sought to make its case by discrediting the defendant's explanation of the events leading to his wife's death.

In order for the state to sustain a conviction of murder in the first degree, it must prove the following beyond a reasonable doubt:

> A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberating upon the matter.

§ 565.020.1, RSMo 1991.

[4,5] The elements of the crime may be shown by direct or circumstantial evidence, but in either event, the state bears the burden to prove the criminal agency of the defendant beyond a reasonable doubt. *State v. May*, 689 S.W.2d 732, 735 (Mo. App. 1985). The corpus delicti of a homicide is not established unless the proof shows that the death was not self-inflicted, from natural cause, or by accident. *Id.*

[6,7] A conviction may rest solely on circumstantial evidence when the facts and circumstances relied upon to establish guilt are consistent with each other, consistent with the guilt of the defendant and inconsistent with any reasonable theory on his innocence.[1] The state's burden does not require it to exclude the impossibility of innocence and the mere existence of

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[1] It is questionable how long the requirement will remain obligating the prosecution to exclude every reasonable hypothesis except guilt. Our Supreme Court has acknowledged that the case for rejecting this standard of review is persuasive, and that the time for its rejection may come. *Villa-Perez*, 835 S.W.2d at 900 n.2.

other possible hypotheses does not take the case from the jury. *State v. Fears*, 803 S.W.2d 605, 608 (Mo. banc 1991).

Defendant's own testimony as well as other physical and direct evidence ruled out suicide, which we will not review because nothing suggests suicide, and the defendant does not seriously contend his wife took her own life. Our review of the sufficiently of the evidence will be directed to defendant's contention that the shooting was accidental.

The prosecution's theory was that the defendant grabbed his wife, pushed her up against the wall, raising her slightly, and killed her with a single shot to the head. A Regional Crime Laboratory chemist measured the blood spattered on a section of the wall board which had been removed from the Middleton residence. The blood spattering was 5'6" from the floor, indicating that he had pushed her up as he shot her (Mrs. Middleton was 5'6" tall and the entry wound was above her left eye, about 3½" below the top of her head). The fresh bruises found on the upper part of her chest were explained by the prosecution as the marks left when he held her up against the wall.

A firearm and tool mark examiner testified that a boot impression in the sheetrock wall appeared to be made by one of the defendant's boots. This is consistent with the state's theory that he used his foot and leg to help hold her.

The empty shell casing from the .357 Magnum and the bullet were recovered from the crime scene and both were determined to have been fired by this gun. There was expert testimony that the stippling pattern on the victim's

forehead indicated that the muzzle of the gun was about as [sic] foot away from the victim's face when it was fired.

The firearm and tool mark examiner testified that the two safeties on the gun would prevent it from discharging accidentally, even if the hammer were cocked. He explained that the trigger must be held back for the gun to fire and the safety devices appeared to be working properly. Dropping the gun repeatedly from heights of five, four and three feet did not cause the gun to fire. If the gun were cocked, it would take $3^1/_2$ pounds of trigger pressure to fire and, if not cocked, it would require $10^1/_2$ pounds of trigger pull.

Additionally, the state presented evidence of the defendant's deceptions. The defendant's two different versions of the shooting, neither of which was consistent with the physical evidence, demonstrated a consciousness of guilt and bears directly on the issue of guilt or innocence. *State v. Rodden*, 713 S.W.2d 279, 290 (Mo. App. 1986). His attempt to eliminate any evidence of gunshot residue from his hands, before the police administered a paraffin test, displays a consciousness of guilt. *State v. Turner*, 633 S.W.2d 421, 424 (Mo. App. 1982).

The facts of this case are unlike those found in *Priest* and *Black*. The defendant's hypothesis of an accidental shooting remains, at best, merely a possibility, and therefore, not sufficient to allow the court to sustain his motion for judgment. The evidence was not two equally valid inferences; one of his guilt and one of his innocence. The facts and circumstances are consistent with each other and with the guilt of the

> defendant, and they are inconsistent with any reasonable theory of the defendant's innocence. The point is denied.

State v. Middleton, 854 S.W.2d 504, 506-509 (Mo. App. W.D. 1993).

The opinion of the Missouri Court of Appeals is consistent with a reasonable application of the United States Supreme Court precedent of *Jackson v. Virginia*, 443 U.S. 307 (1979).[2] There was sufficient evidence in the case at bar for a rational trier of facts to find petitioner guilty beyond a reasonable doubt.

Point denied.

II.

Next, petitioner alleges pretrial statements by him were erroneously admitted in violation of *Miranda*.

Miranda warnings are due only when the suspect interrogated by police is in custody. *Thompson v. Keohane*, 116 S.Ct. 457, 462 (1995). "Custodial interrogation," which triggers requirement that officers administer *Miranda* warnings to a suspect, is defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* at 463. Claims that state

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[2] The Missouri Court of Appeals in fact held the state to a higher standard than that required by *Jackson v. Virginia*, requiring under Missouri law that the facts be inconsistent with any reasonable theory of innocence for conviction. This higher standard was at the time of petitioner's trial used in circumstantial evidence cases.

courts have incorrectly decided *Miranda* issues are appropriately considered in federal habeas corpus review. *Id.* at 463. A state-court determination as to whether a suspect was "in custody" at the time of interrogation for purposes of *Miranda* is not entitled to a statutory presumption of correctness during federal habeas corpus review; such determinations resolve mixed questions of law and fact, and warrant independent review by federal habeas court. *Id.* at 463-65. Two discrete inquiries are essential to determination of whether suspect was in custody at time of interrogation, and therefore entitled to *Miranda* warnings: first, what were the circumstances surrounding interrogation, and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate interrogation and leave. *Id.* at 465. State-court factual findings on scene and action setting questions as to what circumstances were at time of suspect's interrogation, for purposes of determining whether *Miranda* warnings were required, attract presumption of correctness during federal habeas corpus review. *Id.* at 465.

In *Middleton*, the Missouri Court of Appeals found as follows:

> During the events that took place at the defendant's residence, as well as en route to and at the hospital, the defendant was never formally arrested, nor was he given his *Miranda* rights. In separate interviews at the house, only a few minutes apart, the defendant gave two statements, which were factually similar and were admitted into evidence. The defendant's actions and silence during the ambulance ride to the hospital were used against him, as was a

third statement given at the hospital. The defendant's principal contention . . . is whether his statements and his silence in the ambulance were the product of a "custodial interrogation." He maintains the trial court erred in denying his motions to suppress these statements. Therefore, he argues, his statements were rendered inadmissible by the officer's failure to advise him of his *Miranda* rights.

* * *

The defendant advances the following as factual support for his position that he was in actual custody or under like restraint: (1) when the first police officer arrived at the home and found defendant in the front yard, the officer pulled his weapon; (2) later the police removed the .357 Magnum from the presence of the defendant and hid it; (3) Officer Spartz did a pat-down search of the defendant for weapons; (4) Officer Gale's written report said the defendant was in custody within a couple of minutes of the officer's arrival; (5) the officers followed the defendant to the bathroom and ordered him to stop washing his hands and when he refused, they pulled him away from the sink; (6) Officer Spartz escorted the defendant outside and questioned him by the garage; and (7) Officer Spartz was directed to accompany the defendant when he was placed in the ambulance. Alternatively, the defendant continues, these facts make it clear that the focus of the investigation was on him, thereby causing him to be the subject of a custodian investigation requiring a *Miranda* warning.

[8] With respect to the defendant's assertion that when he ran into the front yard he was

faced with a police officer with his gun drawn, the testimony described the defendant as being in a hysterical state. The testimony clearly explained that the officer readied his weapon for his own protection. Later events confirmed that it was not the intent of the officer to arrest the defendant. Once it became apparent that the defendant was not armed, the officer reholstered his weapon.

The officers arrived on the scene of a shooting where an individual had been killed and the survivor was in a highly agitated condition. It is expected that they should exercise caution for their own safety. Patting-down the defendant, hiding the .357 Magnum behind the television, keeping him under observation by following him to the bathroom and accompanying him outside were actions designed to protect their own safety. Further, the officers were obligated to investigate the shooting, which included the preservation of evidence such as gunpowder residue which could be on the hands of the only survivor at the scene of a shooting.

The officer's written report that the defendant was in custody was a conclusionary statement. It was no more determinative or binding on the court's decision that defendant was in custody than if the report had said he was not in custody. The court had the discretion to give whatever weight, if any, it chose to that statement.

The defendant was never formally arrested, handcuffed, taken into custody, or restrained of his freedom to move at will within the house or at any other time until he was arrested a number of days following his second hospital stay. The

police were at the residence as a result of the defendant's 9-1-1 call. With the exception of several temporary and minimal restraints, the defendant was free to move about without restraint. No one forced him to be transported to the hospital; for his own well-being, the paramedics suggested he go and he consented. There is no evidence of strong-arm tactics, deceptions or trickery to obtain incriminating statements. The police questions were straightforward. They simply asked the defendant, who was a primary source of information, to explain what occurred. Finally, the facts do not indicate a police-dominated atmosphere. Certainly, there were occasions when the defendant was restrained but these restraints were minimal, temporary and were necessary either for the officers' protection, concern for Mr. Middleton's safety or the preservation of evidence.

[9] Coercive police activity is the necessary predicate to finding any statement involuntary and, therefore, inadmissible. *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 522, 93 L.Ed.2d 473 (1986). These restraints, limited and temporary, did not amount to a restraint on the defendant's freedom of movement or coercive police activity to a degree that required the *Miranda* warning. The coercive aspects of a custodian interrogation were not present. We hold that at the time these statements were given, the defendant was neither formally arrested nor restrained of his freedom of movement of a degree associated with a formal arrest.

Further, the activities at the house constituted an on-the-scene investigation. *Miranda* makes exception for investigatory questions by

the police. *State v. McNorton*, 748 S.W.2d 690, 691 (Mo. App. 1988). In *Miranda*, the United States Supreme Court states:

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . *General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding.* It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.

Miranda, 384 U.S. at 477-78, 86 S.Ct. at 1629-30 (emphasis added).

[10] The defendant continues his argument that the *Miranda* warning was required by the events in the ambulance and at the hospital. He contends that a *Miranda* warning was required in the ambulance because the trial court allowed the state to infer guilt from his silence (i.e. he faked unconsciousness in the ambulance following the police officer's question in order to avoid answering). Further, he argues a *Miranda* warning was required at the hospital when he made his third statement about the shooting. The defendant argues that both matters should have been excluded because a *Miranda* warning was an unaccomplished prerequisite. Defendant insists the paramedic was an extension of the police in the interrogation process (As part of this point, the defendant repeats his reliance on *Lynn* and *Zancauske*, maintaining he was the "focus" of the police investigation. This issue is taken up later in the opinion.)

It is defendant's position that the paramedic, Wedlock, conducted tests after the defendant appeared unconscious, acting as an extension of the police for the sole purpose of allowing Officer Spartz to question him. Therefore, the defendant contends, his silence should not have been admissible.

In the ambulance, the defendant was relating the events of the incident, when he closed his eyes and abruptly stopped his statement at the point where his wife had picked up his revolver and headed out of the room. The sudden unresponsiveness surprised the paramedic, and in accordance with standard practice, he conducted a series of tests. He rubbed the defendant's sternum to obtain a response (the defendant flinched), pinched the defendant's arm (he flinched again), tried to insert a plastic tube into the defendant's mouth to create an oral airway (the defendant gagged and spit it back out), placed an ammonia capsule under the defendant's nose (he pursed his lips and blew the capsule across the ambulance), and finally, held the defendant's arm over his head and released it. If a person is unconscious, the hand will strike his face. The defendant twice moved his hand as it fell so that it struck the top of his head, rather than his face. The responses caused the paramedic to conclude that the defendant was feigning unconsciousness.

These were standard tests legitimately conducted to evaluate the defendant's medical condition. There was substantial evidence allowing the trial court to conclude that when the tests

were administered by the paramedic, the defendant was not in custody, was not being questioned, and the paramedic was not acting on behalf of the police officer. There is no evidence, except unbridled speculation, supporting defendant's theory that the tests were done in order for the officer to continue questioning the defendant. Defendant's prearrest silence is admissible as a tacit admission. *State v. Lawrence*, 569 S.W.2d 263, 265 (Mo. App. 1978).

The statement that defendant made at the hospital was in more detail than the previous two he had given. At the hospital, when the officer noticed that the defendant had begun to interact with hospital personnel, he went into his room. The defendant agreed to continue talking to him. After the preliminary details, the defendant stated, as related by the police officer: "And he had – he was sitting there in the chair, wiping his gun off, and he got up to hand her the gun. *He doesn't know if he fell back or what, but the next thing he knows, he woke up on the floor or he was on the floor and she was on the floor also*" (emphasis added).

The fact that the questioning occurred at the hospital does not necessarily determine that there was custodial interrogation. *State v. Schnick*, 819 S.W.2d 330, 334 (Mo. banc 1990); *State v. Swingler*, 632 S.W.2d 267, 272 (Mo. App. 1982). When the interview took place, the defendant was not at the mercy of the officer nor was he deprived of his freedom of action to any degree by the police officer. All evidence and inferences were that the defendant could have terminated the interview at any time and directed the officer to leave. The coercive

> aspects of a custodial interrogation were not present. *Schnick*, 819 S.W.2d at 334. The hospital setting and the facts related to the officer's question did not transform itself into a custodian interrogation.

State v. Middleton, 854 S.W.2d at 509-512.

The record in the case at bar does not reflect that petitioner was taken into custody or deprived of his freedom of action in any significant way by the police. The circumstances surrounding petitioner's interrogation do not establish that a reasonable person would have felt that he was not at liberty to terminate the interrogation.

Point denied.

III.

In his third point, petitioner alleges that five improper references were made to petitioner's silence in the ambulance ride to the hospital. Petitioner alleges these references interfered with his right to remain silent.

The first of these references is alleged to have occurred during the prosecutor's opening statement (Petition at 30). However, the record prepared by petitioner on direct appeal in state court did not contain the prosecutor's opening statement. Petitioner's direct appeal brief alleged that the trial court erred in admitting *evidence* of petitioner's failure to respond to questions during the ambulance ride and cited specific transcript references. The brief also referred to two cited references to petitioner's silence in the ambulance made during the state's closing argument as support for the proposition that the evidence was prejudicial. Petitioner's appellate

brief *did not allege an impropriety in the state's opening statement* concerning reference to silence in the ambulance.

Any complaint about references to petitioner's silence in the state's opening statement is procedurally barred since this argument was not presented in petitioner's direct appeal. *See Sloan v. Delo*, 54 F.3d 1371, 1388 (8th Cir.), *cert. denied*, 116 S.Ct. 728 (1995) (rejecting a petitioner's complaint about closing argument as barred since he did not "present the same facts and legal theories to the state courts").

The second reference petitioner complains about is testimony by Officer Spartz at page 173 of the trial transcript. Petitioner, without citation to the transcript, states that this testimony was admitted over petitioner's continuing objection. According to the petition, Officer Spartz introduced the first *evidence* of petitioner's silence during the ambulance ride. There is no contemporaneous objection continuing or otherwise to Officer Spartz' testimony at page 173 of the transcript concerning silence during the ambulance ride.[3] Review of Officer Spartz' entire direct testimony reveals no objection that petitioner's right to remain silent has been violated by reference to petitioner's silence in the ambulance. Petitioner's own direct appeal brief refers to the admission of the testimony as "plain error." Thus at the time of his direct appeal, petitioner apparently agreed with respondent

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[3] At page 174 of transcript defense counsel successfully objected to the officer's qualifications to opine that petitioner was faking unconsciousness. This is not the same objection petitioner now raises.

that this testimony was not objected to at trial. Even if the testimony could have been successfully objected to, a premise respondent does not accept, neither the prosecutor nor the Court had a constitutional duty to keep out relevant evidence which petitioner *did not* object to. *Estelle v. McGuire*, 502 U.S. 62, 71 (1991) ("Nothing in the Due Process Clause of the Fourteenth Amendment requires the State to refrain from introducing relevant evidence simply because the defense chooses not to contest the point"). Therefore no constitutional violation occurred.

Additionally, the Eighth Circuit Court of Appeals has held that silence of a defendant *was* admissible in similar circumstances – i.e., when *Miranda* warnings have not yet been given or *Miranda* rights have been waived. *See e.g., United States v. Rederth*, 872 F.2d 255; 257-258 (8th Cir. 1989) (Detective could permissibly testify in case in chief to defendant's termination of prearrest, pre-*Miranda* warning interview since the right not to have silence used arises from implicit *Miranda* warning assurance that it will not be used); *see also United States v. Harris*, 956 F.2d 177 (8th Cir.), *cert. denied*, 506 U.S. 827 (1992) (Reference to silence is inadmissible because it is fundamentally unfair to induce silence through *Miranda* warnings and later use this silence, but silence following waiver of *Miranda* rights may be used against accused since it is not induced).

The Missouri Court of Appeals specifically noted in its opinion that prearrest silence is admissible as a tacit admission. *State v. Middleton*, 854 S.W.2d at 512. Since this position has been adopted by the Eighth Circuit Court of

Appeals in *Rederth*, it is clearly a reasonable interpretation of United States Supreme Court precedent which should be left undisturbed in a habeas corpus action. *See* 28 U.S.C. § 2254(d); *Drinkard v. Johnson*, 97 F.3d at 769 (noting that court rulings debatable among reasonable jurists must be upheld).

The next reference complained of by petitioner is testimony by a paramedic at page 239 of the transcript. The transcript again does not contain an objection to evidence of petitioner's silence.[4] Therefore the Court and the prosecutor were under no constitutional duty to exclude references to petitioner's silence. *See Estelle v. McGuire*, 502 U.S. at 71. Additionally, insofar as this testimony referred to petitioner's silence it permissibly referred to prearrest, pre-*Miranda* warning silence. *United States v. Rederth*, 872 F.2d at 257-258. The decision of the Missouri Court of Appeals was a reasonable application of United States Supreme Court precedent. 28 U.S.C. § 2254(d). *Drinkard v. Johnson*, 97 F.3d at 769.

The final two references which petitioner complains of are excerpts from the state's closing argument at pages 503 and 544. These excerpts appear to be references to petitioner's feigning of illness in the ambulance. Assuming that these references are comments on petitioner's failure to testify these are permissible comments on

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[4] Page 238 of the transcript appears to contain an objection to testimony about how the shooting occurred as related by petitioner in the ambulance. This objection is aimed at keeping out petitioner's inconsistent account of the crime, not his termination of responses.

pre-*Miranda* warning silence. *See United States v. Rederth*, at 275-258.

Point denied.

IV.

In his fourth point, petitioner alleges that trial counsel was constitutionally ineffective for failing to conduct a reasonable investigation of petitioner's medical condition at the time of or immediately after the victim's death. Petitioner alleges such evidence could have been used to rebut testimony that petitioner feigned an illness after the crime and rebut testimony which created the impression that petitioner was a remorseless executioner.

Petitioner now alleges that he has a history of grand mal epilepsy and that a seizure could have been triggered by stress, emotional trauma or hyperventilation and this could explain his behavior in the ambulance. Petitioner alleges that medical records from St. Mary's Hospital could have supported this theory because records allegedly indicate that petitioner was making jerking movements, had white foamy saliva on his mouth, and was unable to sign an intake information form. Petitioner also alleges that hospital records would have described him as "crying," "tearful," and suffering from grief reaction, post-traumatic stress disorder and adjustment disorder. Petitioner alleges this evidence would have rebutted the impression that he was "an executioner who had no remorse for the death of his wife."

Petitioner's amended Rule 29.15 motion listed as grounds 1 and 2 as the following claims:

> 1. Defendant was denied effective assistance of counsel and due process of law where Defendant's counsel failed to introduce evidence of Defendant Middleton's Medical Evaluation of February 12, 1990 which evidence would have rebutted a critical part of the prosecution's theory of prosecution viz. that the Defendant Middleton was suffering from a medical problem and was not faking a medical event so as to avoid questioning.
>
> 2. The failure of counsel to introduce evidence of Defendant's medical condition prior to and on the date of the homicide deprived the jury of the opportunity to be aware of substantial and material facts which would have countered the prosecution theory on the statements and actions of the Defendant on the date of the homicide.

Petitioner received a state court evidentiary hearing on his Rule 29.15 motion. At the hearing, trial counsel testified that he had read the February 12, 1990 medical reports only after trial because the hospital had not complied with his request to provide the records from February 12, 1990 prior to trial, and he had not followed up prior to trial because he assumed the hospital by not complying was indicating no treatment was given.

Trial counsel's view of the contents of the medical records he eventually received was succinctly brought out on cross-examination as follows:

> Q And in sum and substance, these do not show anything other than tests being run and an accelerated heart rate?
>
> A Basically, that's it.

Testimony also indicated that trial defense counsel was aware of a potential witness who had told the police that petitioner had told him that the way to get away with a murder is to check yourself into a mental hospital.

The Rule 29.15 motion court rejected petitioner's ground holding the following:

> 11. Movant's claim that counsel failed to introduce evidence of his medical evaluation fails to entitle him to relief for several reasons.
>
> First, Movant has not established that his attorney breached any duty owed to his client. His investigation was reasonable under the circumstances. He was aware that Movant was generally in good health. Movant did not tell him of any medical treatment at the hospital. The police reports did not mention medical treatment. Counsel tried to obtain the medical reports from the hospital, but the hospital did not respond to his request. Finally, the medical evaluation itself does not state there was any treatment administered, although tests were made.
>
> Second, the significance of the medical evaluation was not established by Movant at the evidentiary hearing. Movant called no medical experts or doctors to establish the significance or meaning of the medical evaluation. There was no evidence presented at the time of the hearing which is persuasive that the medical evaluation would have refuted the State's contention that Movant was faking a medical event. Additionally, there was no showing that had such medical evaluation been admitted into evidence at Movant's trial, that it would have improved Movant's trial position or changed the outcome

of the trial. It was not shown that the medical evaluation states that Movant was suffering from some disease that would have accounted for his being unconscious shortly after the crime; or that he was suffering from any disease or illness; or that any medicine was prescribed on the day of the incident or after. Movant was discharged the same day. The medical evaluation in no way counters or nullifies the State's strong evidence at trial regarding Movant's physical condition after the incident.

Mr. Duncan testified further that this report might have led him to further investigation and consultation in an effort to determine if this report could be used to help Movant. Movant had an opportunity at his evidentiary hearing to call any experts or other witnesses who could have explained how this medical evaluation could have helped Movant. However, no such witnesses were called. The results of any further investigation and consultation would be conjecture and speculation, which cannot be the basis for post conviction relief.

Third, assuming *arguendo*, that Mr. Duncan violated a duty to Movant and that the medical evaluation could have been helpful to Movant's defense, Movant is still entitled to no relief. The type of help this evidence could have provided Movant is not the type of help that would have made any difference in the outcome of the case. Even assuming Movant's evidence would have nullified the State's contention that movant was faking unconsciousness, this could not have changed the outcome of the trial. This evidence would have had no bearing on the key aspects of the State's case: i.e., a) the strong physical

> evidence showing how Movant's wife died; b) Movant's presence at the scene of the murder; c) his admissions that he handed the gun to his wife in one story, and in another story that she dropped the gun and it went off accidentally, and d) Movant's washing his hands after the police arrived at the scene. Hence, Movant has established no prejudice.
>
> Finally, there is a substantial question as to whether or not Mr. Duncan would have used this medical evaluation, even if it was available, in light of the possibility of opening the door to the State's calling a witness who allegedly had heard Movant say that a murderer could get away with his crime by checking himself into a hospital shortly thereafter. The medical evaluation shows that Movant was released into Independence Regional Hospital from St. Mary's. There was evidence that this was a voluntary commitment for mental treatment. Thus, in light of these additional considerations, the evidence presented at the post-conviction relief hearing is not convincing that Movant's attorney would have changed his trial strategy based upon the medical evaluation.

The Missouri Court of Appeals affirmed the motion court noting that the medical records in question did not support petitioner's claim and that these records only revealed tests, not treatment, of petitioner. *State v. Middleton*, 854 S.W.2d at 518.

Insofar as petitioner is alleging anything beyond the factual and legal claim presented in state court, petitioner's ground is procedurally barred. *See Sloan v. Delo*, 54 F.3d at 1388. Additionally, petitioner is barred from

presenting evidence to support his ground which he did not present at his state court evidentiary hearing. 28 U.S.C. § 2254(e)(2); *Clemmons v. Delo*, 100 F.3d 1394, 1403 (8th Cir. 1996).[5]

The evidence presented by petitioner in state court did not support a finding of ineffective assistance of trial counsel and the motion court acted reasonably in denying petitioner's claim as it was presented and supported in state court proceedings. The motion court reasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984).

Point denied.

V.

In petitioner's fifth ground for relief is an allegation that trial counsel was ineffective for not adequately presenting petitioner's version of the facts – i.e., that the killing was accidental – and for not contradicting or discrediting the "damaging" evidence presented by the state. Petitioner alleges the following deficiencies:

1) counsel did not support the defense theory, that the gun discharged when dropped by the victim, nor did he produce evidence that this could not have happened and he did not develop an alternative defense theory.

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[5] Petitioner's current factual claim about grand mal epilepsy was not presented or supported in state court proceedings. Also, his claim that medical records would have shown him not to be a remorseless executioner by demonstrating his grief was not presented in state court.

2) counsel did not object to crime scene photographs which allegedly omitted a planter and a statue of a giraffe.

3) trial counsel did not tell the jury that no gun powder residue test was performed on the victim's left hand.

4) trial counsel made no opening statement.

5) trial counsel did not call Michelle Brockman, the petitioner's niece who would allegedly have testified how petitioner was feeling prior to the shooting.

6) trial counsel failed to challenge investigatory errors by the Blue Springs Police Department.

Petitioner's entire ground five is procedurally defaulted since it was not properly presented during the Rule 29.15 process and it is now procedurally barred from review. The only claims raised by petitioner in the Rule 29.15 process which bear any arguable similarity to claims in petitioner's ground 5 were claims 5 and 6 in the amended Rule 29.15 motion. At the Rule 29.15 evidentially hearing, petitioner explicitly struck claims 5 and 6 from the amended Rule 29.15 motion and abandoned those claims. These claims which had been abandoned prior to the motion court's decision were not briefed in the appeal of the denial of the Rule 29.15 motion. The claims were not addressed by either the motion court or the Missouri Court of Appeals. Petitioner's failure to present the claims in his current ground 5 to the Rule 29.15 motion court and his failure to raise any of the claims in the ground in the appeal of the denial of the Rule 29.15 motion each create procedural bars to the review of his ground. *See Sloan v. Delo*, 54 F.3d 1381-1383.

Petitioner cannot show good cause and actual prejudice to excuse his default since neither the actions of post-conviction counsel nor the actions of counsel pursuing the appeal of the denial of post-conviction motion can constitute good cause for a default. *Lowe-Bey v. Groose,* 28 F.3d 816, 820 (8th Cir.), *cert. denied,* 115, 674 (1994).

Petitioner's ground five is defaulted and procedurally barred. Furthermore, the six specific allegations raised by petitioner in his ground 5 also are meritless. Since the record does not support a conclusion either that counsel acted outside the wide range of professional competence or that there is a reasonable probability the outcome of trial would have been different had counsel done the things petitioner now suggests. *See Strickland v. Washington,* 466 U.S. 688 (1994).

Point denied.

VI.

In his sixth point, petitioner argues that the alleged prejudice from separate ineffective assistance of trial counsel claims should be evaluated cumulatively. Petitioner cites *Kyles v. Whitley,* 115 S.Ct. 1555 (1995). *Kyles* was a *Brady* violation case involving the cumulative effect of improperly suppressed evidence. It is well established that the prejudice from alleged multiple instances of ineffective assistance of counsel may not be cumulated and each claim of ineffectiveness must stand or fall on its own. *Girtman v. Lockhart,* 942 F.2d 468, 474-475 (8th Cir. 1991).

Point denied.

VII.

In petitioner's seventh ground is a complaint about numerous alleged improprieties in the state's closing argument. This ground is procedurally barred. Petitioner did not allege any improprieties existed in the state's closing argument in his state appellate brief. Petitioner's failure to brief the claims in his ground 7 on direct appeal constituted a procedural default of this ground. *See Sloan v. Delo,* 54 F.3d at 1388 (Finding attacks on the state's closing argument which were not preserved on direct appeal to be barred from habeas review).

Petitioner appears to allege the following were improprieties by the prosecutor in closing argument:

1) Allegedly misleading the jury at page 502 of the transcript by mischaracterizing a pretrial admission by petitioner.

2) Referring to petitioner being able to spend the property of the deceased if acquitted at page 535 of the transcript.

3) Allegedly misleading the jury at page 545 of the transcript by referring to petitioner trying to prevent the victim from running away.

4) Arguing that there was nothing wrong with the petitioner since he did not receive treatment at page 545 of the transcript.

5) Arguing that every witness testified there was not a phone in the dining room at page 546 of the transcript when it allegedly would have been more correct to argue the witnesses could not recall a telephone being in the dining room.

6) Arguing that a Smith and Wesson Model 19 has never accidentally discharged at page 539 of the transcript.

7) Commenting on petitioner's silence in the ambulance at page 544 of the transcript.

8) The prosecutor improperly personalized to the jury at page 548 of the transcript.

Petitioner's motion for new trial complained only about alleged comments during closing argument on petitioner's silence in the ambulance.[6] Thus, seven of eight of petitioner's specific allegations of error were also defaulted *even before* the case was briefed on appeal. *See* Missouri Supreme Court Rule 29.11.

Trial counsel, during the trial, apparently did not think a mistrial was required since petitioner did not ask for a mistrial during trial for any of the grounds. With the exception of the alleged comment on petitioner's silence and the comment on petitioner spending the victim's money, he did not mention any of these instances of alleged improper argument in his motion for new trial.

Petitioner cannot show cause and prejudice to excuse his procedural default since direct appeal counsel acted reasonably in not briefing these unpreserved claims of error and petitioner suffered no prejudice from counsel's

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[6] Petitioner's argument on appeal complained about it being *plain* error to introduce *evidence* of petitioner's silence. The argument in the brief was not *about* improper closing argument, but did refer to it. Assuming this ground to be preserved, it is meritless since it is not proper to comment on pre-*Miranda* warning silence. *See United States v. Rederth*, 872 F.2d at 257-258.

actions. *See Reese v. Delo*, 94 F.3d 1177, 1185 (8th Cir. 1996) (It was "entirely reasonable" for direct appeal counsel not to brief defaulted claim which at best could have received on plain error review). This is particularly true since Missouri courts are extremely reluctant to grant relief on unpreserved claims of error in closing argument in cases in which the petitioner did not contemporaneously ask for a mistrial. *See e.g., State v. Clemmons*, 753 S.W.2d 901, 907-908 (Mo. banc 1988), *cert. denied*, 488 U.S. 948 (1988) (In absence of objection *and* request for relief, plain error should rarely be found since uninvited interference by trial court increases the chances of error); *State v. Wood*, 719 S.W.2d 756, 759 (claims of plain error in closing argument are generally denied without explication since trial strategy looms an important consideration).

Additionally, were petitioner's ground not procedurally barred it would necessarily fail as meritless. The comments complained of do not rise to the level of constitutional violations, assuming that they were even improper. *See Anderson v. Goeke*, 44 F.3d 675, 677-681 (8th Cir. 1996) (noting that allegedly improper comments by the prosecutor did not create a due process violation since the references did not fatally infect the proceedings making the entire trial fundamentally unfair).[7]

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[7] In *Goeke*, the prosecutor introduced evidence of and commented on a murder defendant's 1) extramarital affairs; 2) ownership of certain suggestive lingerie; 3) viewing of pornographic movies; 4) appearance in nude photographs, and 5) her uncharged statutory rape of a sixteen-year-old boy. The *Goeke* court noted that while it did not necessarily approve of the admission of and comment on this evidence it could not say that a due process violation occurred since the entire trial was

VIII.

In his eighth ground, petitioner alleges that his rights to due process and a fair trial were violated because the prosecutor allegedly "had a personal monetary interest in the outcome of civil wrongful death/probate actions against petitioner." This claim is both procedurally barred and meritless.

Petitioner did not raise this claim in his consolidated appeal thus procedurally defaulting it.[8] This claim was raised instead in a motion to recall the mandate which was summarily denied. It is well established that in Missouri a motion to recall the mandate may only be used to allege ineffective assistance of direct appeal counsel or to correct an appellate decision which has come into direct conflict with a subsequent United States Supreme Court precedent. *See Nave v. Delo,* 62 F.3d 1024, 1031-1032 (8th Cir. 1995).

Petitioner does not allege that he filed a state habeas corpus petition under Missouri Supreme Court Rule 91 raising the claim in his eighth ground. Since petitioner's eighth ground would not be cognizable in a state habeas

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not made fundamentally unfair. The arguments complained of in this trial were much more mild and less prejudicial than those in *Goeke.*

[8] Petitioner is barred from asserting ineffective assistance of appellate counsel as cause to excuse the default since petitioner's motion to recall the mandate did not allege that *appellate counsel was ineffective* for not raising the claim of prosecutorial misconduct in this ground. *Whitmill v. Armontrout,* 42 F.2d 1154, 1157 (8th Cir. 1994), *cert. denied,* 116 S.Ct. 249 (1995).

corpus action, the ground is exhausted through procedural default. *See Sloan v. Delo,* 54 F.3d at 1382-1384 (noting that a state habeas corpus action may not be used to pursue a claim which could have been but was not raised on direct appeal or in a state post-conviction relief motion, and that a claim not raised properly in these forms is exhausted through procedural default if a state habeas petition was not filed).

The only exceptions to the rule that a claim properly cognizable in an appeal or Rule 29.15 motion may not be raised in a state habeas corpus action are exceptions for jurisdictional and claims which present "an issue of manifest injustice resulting from rare and extraordinary circumstances and warranting the relief requested." *Id.* at 1382.

As a *minimum* prerequisite to having a claim considered under the manifest injustice exception in a Rule 91 motion, the claim must not have been discoverable when relief in the proper forum was available. *Id.* at 1382. However, the claim being undiscoverable is a minimum prerequisite to consideration and the threshold for showing manifest injustice is much higher. *See Duvall v. Purkett,* 15 F.3d 745, 747 n.3 (8th Cir. 1994) (noting that the threshold for showing manifest injustice under Missouri Supreme Court Rule 91 "resembles the federal standard for determining whether procedural default should be excused in the absence of cause and prejudice").

In this case, petitioner's ground was discoverable even during trial. Trial defense counsel cross-examined the victim's sister about a wrongful death suit family

members had brought against petitioner. Petitioner's conflict of interest claim appears to stem from the prosecutor's father, Judge William J. Peters, being of counsel to the firm which handled the wrongful death suit. Petitioner could have discovered this by making a phone call to the firm or looking at a copy of the firm letterhead. This claim fails as procedurally barred.

The ground is also meritless. *Young ex rel. v. Vuitton*, 481 U.S. 787 (1987), cited by petitioner involved a case in which a prosecutor in a criminal contempt case also represented the party in the underlying civil litigation who would benefit from a contempt order. Despite petitioner's assertions, the record does not support a finding that prosecutor Peters or his father had anything to do with the civil suit or received any remuneration arising from the civil suit. In fact, an affidavit presented to the Missouri Court of Appeals indicates that prosecutor Peters' father did no work on the civil case and received no remuneration from the case. There was no showing of financial interest on the part of prosecutor Peters in the case and, therefore, no constitutional violation.

Point denied.

IX.

In his ninth point, petitioner alleges that counsel was ineffective for not briefing the following claims on direct appeal:

> 1) The eight instances of allegedly improper closing argument asserted in petitioner's ground seven.

2) The prosecutorial conflict of interest claim in petitioner's ground eight.

3) The *Brady v. Maryland* claim in petitioner's ground thirteen alleging that the prosecution suppressed gun powder residue tests on the victim's left hand and photographs depicting a phone near where the victim was found.

4) The claim in petitioner's ground fourteen that the prosecutor directed that a witness be given property worth $18,700 in exchange for testimony that the prosecutor knew to be misleading.

5) A claim that the trial court erred in not suppressing evidence found during an allegedly illegal search of petitioner's home and or an allegedly illegal arrest including a gun cleaning kit, the boots petitioner was wearing at the time of the crime, sheetrock and door facings.

Standard of Review

The proper standard for reviewing the effectiveness of direct appeal counsel is the two-pronged *Strickland* test. *Bell v. Lockhart*, 795 F.2d 655, 657 n.6 (8th Cir. 1986); *see Strickland v. Washington*, 466 U.S. 668 (1984) (requiring, for a finding of ineffective assistance of counsel, a showing that counsel acted incompetently and that there is a reasonable probability that counsel's incompetent action changed the outcome of the proceeding). Appellate counsel is not required to brief all colorable issues on appeal, but is expected to winnow out weaker issues. *See Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986). Appellate counsel is not responsible for anticipating changes in the law in his brief by briefing issues

based on expected favorable changes in the law which may be anticipated but have not yet occurred at the time of briefing. *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990). The effectiveness of appellate counsel must be viewed in the light of the circumstances of the case, including that appellate counsel may only seek review of unpreserved claims for plain error under the standard set out in Missouri Supreme Court Rule 30.20. *Pollard v. Delo*, 28 F.3d 887, 889 (8th Cir.), *cert. denied*, 115 S.Ct. 518 (1994). Additionally, the determination of the Missouri Court of Appeals in the motion to recall the mandate proceeding that counsel was not ineffective may only be reviewed for reasonableness on grounds presented in the motion to recall the mandate. 28 U.S.C. § 2254(d).

Analysis

Subclaim 1:

As referenced in discussion of petitioner's ground seven, petitioner's trial counsel did not contemporaneously allege a mistrial was necessary in connection with any of the allegedly improper arguments petitioner challenged in his ground seven. Appellate counsel would have had very little chance of succeeding on appeal on the theory that the trial court should have *sua sponte* granted relief petitioner did not ask for. *See State v. Clemmons*, 753 S.W.2d at 907-908; *State v. Wood*, 719 S.W.2d at 759. Counsel was not ineffective for not briefing grounds that had little or no chance of success. *See Reese v. Delo*, 94 F.3d at 1185.

Subclaim 2:

Petitioner's motion to recall the mandate *did not* allege that direct *appeal counsel was ineffective* for not briefing the allegation of prosecutorial misconduct in petitioner's ground eight. Instead, the motion presented the underlying claim of trial error alleging that the trial error rose to the level of a due process violation.

Claims of ineffective assistance of appellate counsel not raised in the *initial* motion to recall mandate are *procedurally barred*. *Clemmons v. Delo*, 100 F.3d 1394, 1402 (8th Cir. 1996).

Furthermore, as addressed in response to ground eight, the under-lying claim is factually meritless. Additionally, the ground was not preserved for appellate review, and appellate counsel's action in not briefing the claim was neither prejudicial nor objectively unreasonable. *Reese v. Delo*, 94 F.3d at 1185.

Subclaim 3:

Petitioner alleges that direct appeal counsel was ineffective for not briefing a claim that the state suppressed gun powder residue tests from the victim's left hand and that the state suppressed photographs of a dining room wall which showed a telephone.

Petitioner has not established that either was suppressed. Petitioner speculates that gunshot residue tests were done on the victim's left hand but that the police report was altered to show that no test was done. Petitioner also concludes that photographs must have been

suppressed because "it is beyond credibility that photographs of that portion of the room were not taken."

The claim concerning the residue test is not preserved in the motion for new trial. Additionally, the claims are speculative and not supported by the trial record. The Missouri Court of Appeals could not and would not have granted relief on the available record. Counsel was not ineffective in not briefing these claims.

Subclaim 4:

Petitioner alleges that direct appeal counsel should have alleged that the prosecutor compensated the victim's sister with jewelry worth $18,700 in exchange for testimony the prosecutor knew to be misleading. This claim is unsupported by the appellate record and not preserved in the motion for new trial. It would have had no chance of success on appeal. Counsel acted properly in not briefing this claim.

Subclaim 5:

Petitioner alleges that counsel was ineffective for not alleging on appeal that a gun cleaning kit, boots, a piece of sheetrock and door facings should have been suppressed because these were the product of an illegal arrest or an illegal search. The trial legal file does not indicate that petitioner ever moved to suppress this evidence.[9] Review of the transcript reveals doortrim, two

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[9] Petitioner only moved to suppress statements. He received a hearing on that motion.

pieces of wall, and boots were admitted into evidence without objection. The list of exhibits admitted does not mention a gun cleaning kit, although an officer did testify that a kit was found. There was no objection to this testimony. Petitioner's motion for new trial does not allege that it was error to admit these items or the testimony about the gun cleaning kit. There was nothing for the appellate court to review on these issues and counsel acted reasonably in not pursuing these issues on appeal.

Ground 10:

Petitioner alleges that direct appeal counsel was constitutionally ineffective because ineffective assistance of counsel is a *direct appeal issue* and petitioner's consolidated appellate brief which trial counsel worked on alleged ineffective assistance of trial counsel. Petitioner alleges an impermissible conflict of interest was created. Review of the record reveals that two attorneys signed petitioner's consolidated appellate brief; Robert G. Duncan, trial counsel, and Gerald M. Handley who represented petitioner during post-conviction proceedings. It is reasonable to presume trial counsel handled trial issues and post-conviction counsel handled the post-conviction review issue – i.e., ineffective assistance of trial counsel.

In regard to petitioner's contention that ineffective assistance of trial counsel was a direct appeal issue, the Eighth Circuit Court of Appeals has held as follows:

> In Missouri, ineffective assistance of trial counsel claims cannot be raised on direct appeal, even where the record is sufficient to permit review and may only be raised in a Rule

29.15 proceeding. *State v. Wheat*, 775 S.W.2d 155, 157-58 (Mo. 1989) (en banc), *cert. denied*, 493 I.S. 1030, 110 S.Ct. 744, 107 L.Ed.2d 762 (1990).

Lowe-Bey v. Groose, 28 F.3d 816, 819 (8th Cir.), *cert. denied*, 115 S.Ct. 674 (1994). The Court in *Lowe-Bey* went on to hold that in a consolidated appeal the appellant is only entitled to effective assistance of counsel on the direct appeal issues, *not* the post-conviction review issues. *Id.* at 820.

Petitioner is alleging that counsel was ineffective due to a conflict of interest in presenting a post-conviction review claim – i.e., that trial counsel was ineffective. This claim is not cognizable in a habeas corpus action since there is no right to effective assistance of counsel on the post-conviction review issues in a consolidated appeal.

Ground 11:

Petitioner alleges that the "firmly convinced" language in the Missouri jury instruction on reasonable doubt violates due process law. Binding precedent dictates that this claim is barred by the nonretroactivity principle of *Teague v. Lane. Sidebottom v. Delo*, 46 F.3d 744, 760 (8th Cir.), *cert. denied*, 116 S.Ct. 144 (1995), *citing Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Ground 12:

Petitioner alleges that the cumulative effect of all the errors during petitioner's trial, post-conviction proceedings, and appeal should be considered together in order

to determine if petitioner should receive a new trial. Petitioner cites *Kyles v. Whitley,* 115 S.Ct. 1555 (1995). *Kyles* deals with cumulating the prejudice from suppression of various items of evidence in a *Brady* claim. *Kyles* does not stand for the broad proposition asserted by petitioner. Such a broad proposition is contrary to the Eighth Circuit precedent. *See Girtman v. Lockhart,* 942 F.2d at 474-475.

In any event, the argument is *Teague*-barred since petitioner's direct appeal was denied in April, 1993 and rehearing was denied in June, 1993, while *Kyles* was not decided until April, 1995 – almost two years later. *See Teague v. Lane,* 498 U.S. 288 (1989).

Ground 13:

Petitioner alleges that the prosecutor failed to turn over gunshot residue tests on the victim's left hand and photographs of a portion of the victim's dining room which showed a wall telephone. This claim is procedurally barred since it was not raised on direct appeal. *See Sloan v. Delo,* 54 F.3d at 1388. Direct appeal counsel acted reasonably in this ground since it is not supported by the record on appeal.

Ground 14:

Petitioner alleges that the prosecutor violated petitioner's right to due process of law because he compensated a witness, the victim's sister, for testimony he knew to be misleading by providing her with jewelry worth $18,700. This claim was not raised in the motion for new

trial or in petitioner's direct appeal brief. It is defaulted and procedurally barred. *Sloan v. Delo,* 54 F.3d at 1388.

Petitioner cannot show cause to excuse the default since nothing in the record on appeal supports this allegation and the allegation was defaulted even before the appeal began when it was not raised in the new trial motion. *Reese v. Delo,* 94 F.3d at 1185.

WHEREFORE, for the reasons stated herein, Petitioner's Second Amended Petition for Writ of Habeas Corpus is DENIED.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: 4-28-98

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

KENNETH MIDDLETON,)
Plaintiff (s),)
v.)
MICHAEL BOWERSOX,)
Defendant (s).)

Case No. 95-1302-CV-W-4
(Filed Apr. 29, 1998)

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action has come before the Court as a briefed matter and a decision has been rendered.

IT IS ORDERED that petitioner's Second Amended Petition of Writ of Habeas Corpus is denied.

April 29, 1998
Date

R. F. Connor
Clerk

_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KENNETH G. MIDDLETON,	)	
Petitioner,	)	**Case No. 95-1302-CV-W-4**
vs.	)	**(Filed Jun. 12, 1998)**
MICHAEL BOWERSOX,	)	
Respondent.	)	

ORDER DENYING MOTION TO VACATE, SET ASIDE OR CORRECT JUDGMENT

In his Motion to Vacate, Set Aside or Correct Judgment petitioner argues that this Court should have reviewed his second amended petition under pre-AEDPA[1] standards. Fed.R.Civ.P. 15(c)(2) provides that an amendment to a pleading relates back to the date of the original pleading when the claims or defenses asserted in the new pleading arose out of the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original proceeding. In the case at bar, not all of petitioner's claims in his second amended petition were raised in his original petition and do not relate back under Fed.R.Civ.P. 15(c)(2). *Gibson v. Resolution Trust Corp.*, 51 F.3d 1016, 1027 (11th Cir. 1995). Furthermore, all of petitioner's claims fail under both pre-AEDPA standards as well as post-AEDPA standards. Petitioner's argument that the Court employed the wrong standard of review is denied.

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[1] Anti-Terrorism and Effective Death Penalty Act.

Additionally, petitioner argues that the Court erred in denying his arguments in an effort to avoid procedural bar, that the Court improperly decided petitioner's Miranda claims, and that the Court erred in declining to consider complaints about the state's opening statement that were not raised on direct appeal. All of these complaints of petitioner relate to the Court's application of existing law to the facts of this case. The matters raised in these complaints are not the proper subject of a 59(e) motion. A 59(e) motion must rely on one of three major grounds; 1) in intervening change in controlling law, 2) the availability of new evidence not available previously or 3) the need to correct a clear error of law or prevent manifest injustice. *Bannister v. Armontrout*, 807 F.Supp. 516, 556 (W.D. Mo. 1991). These complaints are denied.

Petitioner also argues that he was entitled to an evidentiary hearing on his claims. Petitioner's second amended petition for habeas corpus was filed after the effective date of the AEDPA became effective on April 24, 1996. The standard for receiving an evidentiary hearing under that statute is as follows:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary

> hearing on the claim unless the applicant shows that –
>
> (A) The claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e). Petitioner clearly has not met this standard.

Petitioner also is not entitled to an evidentiary hearing under the old habeas corpus statute. Petitioner's allegation that he is entitled to an evidentiary hearing is incorrect.

> Generally, an evidentiary hearing is required in a habeas proceeding if petitioner "alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing." *Houston v. Lockhart*, 982 F.2d 1246, 1250 (8th Cir. 1993) (quoting *Spillars v. Lockhart*, 802 F.2d 1007, 1009 (8th Cir. 1986)). However, the petitioner is not entitled to a hearing where the record clearly indicates that his claims are either barred

> from review or without merit. *Reynolds v. Caspari*, 974 F.2d 946, 948 (8th Cir. 1992); *Wiles v. Jones*, 960 F.2d 751, 754 (8th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 423, 121 L.Ed.2d 345 (1992).

Wilson v. Kemna, 12 F.3d 145, 146 (8th Cir. 1996).

In this case, petitioner had a state court evidentiary hearing on his post-conviction relief motion and the record demonstrates that all petitioner's grounds for relief are meritless or barred.

WHEREFORE, for the reasons stated above, petitioner's Motion to Vacate, Set Aside or Correct Judgment (Doc. #31) is DENIED.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: 6-12-98

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3009WMKC	*	
Kenneth G. Middleton,	*	Order denying Petition for
	*	Rehearing and for
Appellant,	*	Rehearing En Banc
	*	
v.	*	
	*	
Michael Bowersox,	*	
Superintendent,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 16, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KENNETH G. MIDDLETON,	)	
Petitioner,	)	Cause No.
	)	4:95CV02262CDP
vs.	)	
Michael Bowersox,	)	[Evidentiary Hearing
(Warden)	)	Requested]
	)	
Respondent.	)	(Filed Dec. 4, 1995)

PETITIONER UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

COMES NOW, Petitioner, Kenneth G. Middleton, **Pro-se,** and in support of his cause of action states as follows:

INFORMATION REQUIRED BY LOCAL RULE 25 AND HISTORY OF PRIOR PROCEEDINGS

1. Name and location of court which entered the judgment of conviction under attack: Circuit Court of Jackson County, Missouri

2. Date of judgment of conviction: February 22, 1991

3. Length of sentence: Life without parole, plus 200 years

4. Nature of offense involved (all counts): One Count of Murder in the First Degree. One count of Armed Criminal Action

5. What was your plea? (check one)

   (a) Not guilty [X]

(b) Guilty [ ]

(c) Nolo Contender [ ]

If you enter a guilty plea to one count of the indictment, and a not guilty plea to another count of indictment, give details: N/A

6. If you pleaded not guilty, what kind of trial did you have? (check one)

(a) Jury [X]

(b) Judge only [ ]

7. Did you testify at the trial? Yes [ ] No [X]

8. Did you appeal from the judgment of conviction? Yes [X] No [ ]

9. If you did appeal, answer the following:

(a) Name of court: Missouri Court of Appeals Western District

(b) Result: All relief denied on the First Degree Murder and Armed Criminal Action

(c) Date of result and citation, if known: 854 S.W.2d 504 (Mo.App.W.D. April 6, 1993)

(d) Grounds raised: Same as presented herein, except 12 [8-9-10]

(e) If you sought further review of the decision on appeal by a higher State Court, please answer the folowing:

(1) Name of the Court: Missouri Supreme Court

(2) Result: All relieve denied

(3) Date of result and citation, if known: Mo. S.Ct. No. 75960, June 29, 1993.

(4) Grounds raised: Same as presented herein, except 12 [8-9-10]

(f) If you filed a petition for Certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of Court: N/A

(2) Result: N/A

(3) Date of result and citation, if known: N/A

(4) Grounds raised: N/A

10. Other than a direct appeal from judgment of conviction and sentence, have you previously filed any petition, applications, or motions with respect to this judgment in any court, State or Federal?
Yes [X] No [ ]

11. If the answer to 10 was "yes", give the following information:

(a) (1) Name of Court: Circuit Court of Jackson County

(2) Nature of proceeding: Mo.S.Ct. Rule 29.15

(3) Grounds raised: Same as presented herein, except 12 [8-9-10]

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes [X] No [ ]

(5) Result: All relief denied

(6) Date of result: April 9, 1992

(b) As to any second petition, application or motion, give the same information:

(1) Name of Court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [ ] No [ ] N/A

(5) Result: N/A

(6) Date of result: N/A

(c) Did you appeal to the highest State court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes [X] No [ ]

(2) Second petition, etc. Yes [X] No [ ]

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: N/A

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

12. GROUNDS ON WHICH PETITIONER IS BEING UNLAWFULLY HELD:

A. The trial court erred when it: 1) overruled Petitioner's motion for acquittal at the close of the evidence; 2) sustained the jury's verdict; and 3) sentenced Petitioner for murder, because the prosecution failed to prove each and every element of the offenses beyond a reasonable doubt, and thus violated Petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Specifically, the prosecution failed to present evidence sufficient to prove the required corpus delicti for First Degree

Murder (ie., that death was caused by the criminal agency of another).

1. SUPPORTING FACTS: The state's burden of establishing each element of the offense beyond a reasonable doubt includes proving that death was not accidental. Faced with a lack of evidence as to how the shooting occurred, the prosecution sou ıt to meet its burden solely by disproving itioner's explanation. However, while pointing out inconsistencies in Petitioner's explanation may show that the events did not occur exactly as Petitioner claimed, it neither negates all possibility of accidental death nor justifies a presumption that only intentional and purposeful action could have caused the gun to fire. Specifically, there is no evidence to rule out suicide, no evidence of motive or animosity, and the physical evidence is equally consistent with other theories of accidental death. Without "something more," merely showing that Petitioner lied about what really happened is not sufficient to meet the state's burden of proving criminal agency for First Degree Murder.

B. The trial court plainly erred, abused its discretion, and violated Petitioner's Fourth, Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution, when it overruled Petitioner's motion to suppress statements made during custodial interrogation, but prior to any *Miranda* warning.

1. SUPPORTING FACTS:

a. Officer Gale and Spartz conceded that they did not give Petitioner any *Miranda*

warnings prior to questioning him at the scene, in the ambulance, and at the hospital.

b. Petitioner was "in custody" when the questioning occurred. Among the indicia of custody are the fact that: 1) Officer Gale drew his gun and pointed it at Petitioner when he initially approached Petitioner; 2) upon arriving at the scene, Officer Spartz conducted a pat-down search of Petitioner; 3) both Officers used force to prevent Petitioner from washing his hands; 4) from the moment police officers arrived on the scene, Petitioner was either watched, supervised, or escorted by police officers; 5) prior to departing for the hospital, Petitioner attempted to contact his attorney; 6) Officer Spartz was directed by his supervisor to accompany Petitioner during the ambulance ride to the hospital; 7) upon their arrival at the hospital, Officer Spartz continued to watch Petitioner closely and seized Petitioner's clothing; and 8) Petitioner believed that he was in custody. Under these circumstances, a reasonable person in Petitioner's position would believe that he was in custody and not free to leave.

c. Even Officer Gale's police log indicates that the very officers who seized Petitioner believed that Petitioner was in custody shortly after Officer Gale's arrival at the scene.

C. The trial court erred and violated Petitioner's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution when it permitted the prosecution to introduce, over Petitioner's

continuing objection, evidence of Petitioner's silence and efforts to obtain responses from Petitioner during the ambulance ride, and evidence of statements obtained by Officer Spartz at the hospital prior to Petitioner receiving *Miranda* warnings.

1. SUPPORTING FACTS:

a. As stated in Point B above, evidence of Petitioner's silence, efforts to elicit responses, and any statements

conjecture and lacked proper foundation. As such, the admission of this evidence amounted to a manifest injustice, which should be recognized as plain error, and violated Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

1. SUPPORTING FACTS:

a. The medical examiner's conclusion that the victim's death was a homicide rather than a suicide was based, at least in part, on unspecified information provided by the police. Without further explanation of the information provided and relied upon by the medical examiner, such opinion evidence lacked proper foundation. Permitting such evidence to be presented to the jury as the opinion of an expert violated Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

b. No connection was established between the victim's wound and the stains on the wall. The chemist's analysis of the spatters and stains on the wall was based solely on

an assumption that spatters were the victim's blood.

c. The firearms examiner lacked the requisite expertise and experience to qualify him as an expert. His testimony that the force of a shot from a .357 magnum revolver would not throw the victim's head against the wall even if the head was only two inches from the wall, was not based on years of experience or re-enactments, but instead was based solely on misleading, unscientific, and speculative comparisons with hunting experiences and a shooting he had seen on T.V.

E. Petitioner's conviction was obtained in violation of his Fifth, Eighth, and Fourteenth Amendment rights under the United States Constitution because the jury instruction defining "reasonable doubt" impermissibly reduced the state's burden of proof.

1. SUPPORTING FACTS: Instruction No. 4, patterned after MAI-CR 3d 302.04, was given at the conclusion of the trial. The instruction provides, in pertinent part, that "proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. . . . If, after your consideration of all the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you will find him guilty." The instruction's use of the phrase "firmly convinced" and its admonition that "the law does not require proof that overcomes every possible doubt" is conceptually indistinguishable from the civil standard used in equitable cases that

evidence must be shown by "clear and convincing evidence" and could very easily lead a reasonable juror to believe that a finding of guilty could rest on a degree of proof below that required by the Due Process Clause.

F. Petitioner was denied a fair and impartial trial and the verdict was not based on a dispassionate assessment of the evidence in that the trial court submitted Instruction Number 5, which injected on improper element into consideration, to the jury and accepted the jury's verdict based upon this instruction, in violation of Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

1. SUPPORTING FACTS: Instruction No. 5 states in total:

> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> > First, that on or about February 12, 1990, in County of Jackson, State of Missouri, the defendant caused the death of Katherine Middleton by shooting her, and
> >
> > Second, that it was the defendant's purpose to cause the death of Katherine Middleton, and
> >
> > Third, that defendant did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief,
>
> then you will find the defendant guilty of Count I of murder in the first degree.

> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the first degree.
>
> If you do find the defendant guilty under Count I of murder in the first degree, you will assess and declare the punishment at imprisonment for life without eligibility for probation or parole.

Instruction No. 5.

> The final paragraph of Instruction No. 5 injects an improper element into consideration at the guilt stage. Instead of focussing only on the elements of the offense and whether they have been proven beyond a reasonable doubt, the jury is allowed to assess guilt in relation to punishment. The issue thus becomes emotional, rather than legal, thus making it impossible for Petitioner to have a fair trial.

G. Petitioner's conviction was obtained in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution because Petitioner was denied effective assistance of counsel at trial and upon direct appeal.

1. SUPPORTING FACTS:

> a. Defense counsel was ineffective for failing to adequately investigate whether or not Petitioner received medical treatment at St. Mary's Hospital in Blue Springs, Missouri. The State's contention was that Petitioner did not receive any treatment at the hospital. This bolstered their assertion that defendant was faking his condition so as to avoid

questioning by the officer in the ambulance and allowed the State to use the defendant's silence against him. Defense counsel had notice that the State intended to proceed in this fashion. Counsel's failure to acquire these records and/or fully investigate the truth of the State's assertion, in order to rebut the State's claim, was not a reasonable trial tactic.

b. Because of defense counsel's failure to investigate, defense counsel failed to discover that Petitioner's commitment to the hospital was involuntary, which would have bolstered Petitioner's claim that he was unlawfully interrogated without the benefit of *Miranda* warnings while at the hospital. (See *supra* Points B and C).

c. The failure of trial counsel to investigate significantly prejudiced Petitioner at the suppression hearing and at the trial itself.

H. Petitioner's conviction was obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the prosecution elicited trial testimony that he knew or should have know was perjured testimony, suppressed exculpatory evidence favorable to the Petitioner; and changed, altered and destroyed evidence favorable to Petitioner. Furthermore the prosecutor related to the jury in closing arguments evidence not in the record, that he knew to be perjured.

I. Petitioner's conviction was obtained in violation of the Sixth and Fourteenth Amendments because post-conviction and direct appeal counsel, Mr. Gerald M. Handley, while pretending to represent Petitioner in the Rule 29.15 post-conviction proceeding, did deliberately proceed in such a manner as to insure that all

relief would be denied to Petitioner in the state courts.

1. SUPPORTING FACTS

a. On or about March 12, 1992, Mr. Handley came to the Jackson County jail to visit Petitioner. During this visit, Mr. Handley repeatedly tried to convince Petitioner to dismiss the pending state post-conviction proceeding. When Petitioner refused to dismiss his pending post-conviction proceeding, the following day, without Petitioner's prior knowledge or consent, counsel Handley dismissed the majority of the claims then pending before the Court. Mr. Handley took this action knowing the claims he was dismissing had merit and if prosecuted, would entitle Petitioner to relief from the criminal conviction. Mr. Handley knowingly failed and refused to present the testimony of Mr. Charles D. Gay, an experienced investigator, having been involved in police investigation work for over twenty-eight year. Based on his years of experience in the field of investigations and his knowledge in the use of weapons, Mr. Gay would have testified that, after examination of the evidence and police reports, he noted serious inconsistencies. Mr. Gay was present on the 13th day of March, 1992, waiting before the evidentiary hearing started and stayed until the hearing was over. Mr. Handley, however, refused Petitioner's demands to call Mr. Gay to testify.

J. Petitioner's Fourth, Fifth, Sixth and Fourteenth Amendment rights were violated when evidence was seized and collected from Petitioner's residence,

without the use of a search warrant or written or oral consent to conduct a search.

K. Petitioner was denied equal protection of the law in violation of the Fifth Amendment and Fourteenth Amendments, when in deciding the grounds for relief *supra,* the Missouri courts failed and refused to apply established Missouri law in an even-handed manner, in direct violation of the teachings of *Parker v. Dugger,* 111 S. Ct. 731 (1991). This denial of equal protection was created when the Missouri Courts failed to honor the established Missouri decisions presented by Petitioner in his direct appeal brief in support of each of the grounds for relief identified *supra. See Williams v. Armontrout,* 891 F.2d 656, 659 n.1 (8th Cir. 1989).

13. If any of the grounds listed in paragraph 12 were not previously presented in any other court, State or Federal, state briefly what grounds were not so presented, and give our reasons for not presenting them:

1. Paragraph 12 [H, I, J] were not presented to any state court on the grounds of ineffective assistance of appellate and post-conviction counsel, in that appellate and post-conviction counsel refused to do so.

2. Appellate counsel, Robert G. Duncan, had a conflict of interest that arose from his representation of the Petitioner at trial.

3. There are a number of issues which appellate counsel[s], Robert G. Duncan and Gerald M. Handley, should have raised in Petitioner's brief. Mr. Duncan's and Mr. Handley's failure to do so deprived Petitioner of his right to the effective assistance of appellate counsel[s], in violation of the Fifth, Sixth, and Fourteenth

Amendment to the Federal Constitution and Article I, section 10 of the Missouri Constitution. Mr. Duncan's and Mr. Handley's neglect deprived Petitioner of a number of substantive rights under State and Federal law.

14. Do you have any petition or appeal now pending in any court, either State or Federal, as to the judgment now under attack? Yes [ ] No [X]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(A) At arraignment and plea: Robert G. Duncan, 2800 B Kendallwood Parkway, Kansas City, Missouri 64119

(B) At trial: Robert G. Duncan

(C) At sentencing: Robert G. Duncan

(D) On appeal: Robert G. Duncan, 2800 B Kendallwood Parkway, Kansas City, Missouri 64119 and Gerald M. Handley, 1150 Grand Ave., Kansas City, Missouri 64106.

(E) In any post-conviction proceeding: Gerald M. Handley, 1150 Grand Ave., Kansas City, Missouri 64106

(F) On Appeal from any adverse ruling in a post-conviction proceeding: Robert G. Duncan and Gerald M. Handley.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes [X] No [ ]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes [ ] No [X]

(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) Give date and length of the above sentence: N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes [ ] No [ ] N/A

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays this Court:

A. Issue an Order to have him brought before it, to the end that he may be discharged from the unconstitutional confinement and restraint pursuant to this judgment and sentence;

B. Permit him, because of his indigency, to proceed without prepayment of cost or fees;

C. Grant him, because of his indigency, sufficient funds to secure expert and lay testimony necessary to prove the facts as alleged in his petition;

D. Grant him the authority to obtain subpoenas *in forma pauperis* for witnesses and documents necessary to prove the facts as alleged in his petition;

E. Allow him a reasonable period of time to brief the issues of law raised by this petition;

F. Grant such other relief as may be necessary and appropriate.

Respectfully submitted by,

/s/ Kenneth G. Middleton
Kenneth G. Middleton [Pro se]
Route 2, Box 2222
Mineral Point, Missouri 63660

I declare under penalty of perjury that the foregoing is true and correct, and that I placed this petition in the institutional mailbox postage pre-paid this 10 day of November, 1995.

Executed on this 10 day of November, 1995.

/s/ Kenneth G. Middleton
Kenneth G. Middleton/Petitioner

Supreme Court, U.S.
FILED
NOV 2 1999
OFFICE OF THE CLERK

No. 99-268

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

KENNETH G. MIDDLETON,
Petitioner,

vs.

MICHAEL L. KEMNA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

MICHAEL J. SPILLANE
Assistant Attorney General
Counsel of Record
Post Office Box 899
Jefferson City, MO 65102
(573) 751-3321
Attorneys for Respondent

Questions Presented

I. Whether this Court should grant certiorari to consider whether the District Court erred in reviewing claims under the standard of review set out in the Anti-Terrorism and Effective Death Penalty Act in a case in which the initial *pro se* habeas petition was filed before the effective date of the act, even though the District Court found that all the petitioner's claims also failed under the pre-Anti-Terrorism and Effective Death Penalty Act standard? . . . . . .

II. Whether this Court should grant certiorari to review whether the District Court acted correctly in finding that the petitioner was not in custody when he made certain statements and performed certain acts that were later admitted in evidence? . . . . . .

III. Whether this Court should grant certiorari to determine if the District Court acted correctly in finding certain claims to be procedurally barred either because a state court allegedly reached the merits of some of the claims or because good cause and actual prejudice were demonstrated? . . . . . .

IV. Whether this Court should grant certiorari to review whether the court below erred in denying a certificate of appealability as opposed to denying a certificate of probable cause because the court below views the standards for granting these certificates in a case raised under 28 U.S.C. §2254 as identical and therefore the petitioner could have suffered no prejudice . . . . . .

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I. This Court should not grant certiorari to determine whether the District Court erred in considering certain habeas claims under the post-AEDPA standard because the record indicates that all the petitioner's claims were found to have failed under the pre-AEDPA standard as well as the post-AEDPA standard, and therefore a determination would merely be an advisory opinion 18

II. This Court should not grant certiorari to review whether the petitioner was in custody when he made certain statements and performed certain acts because this is a very fact specific inquiry that presents no true conflict between decisions or question of general interest 18,19

III. This Court should not grant certiorari to review whether the District Court erred in finding certain claims to be procedurally barred because this claim presents no significant conflict with decisions of this Court or circuit courts of appeals and it presents no question of general interest, and all the claims were

reviewed on the merits making the question of bar moot 20

IV. This Court should not grant certiorari to review whether the court below erred in denying a certificate of appealability as opposed to denying a certificate of probable cause because the court below views the standards for granting these certificates in a case raised under 28 U.S.C. §2254 as identical and therefore the petitioner could have suffered no denying 22

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Statement of the Case

The Missouri Court of Appeals found following general facts concerning the crime of which the petitioner was convicted:

> The evidence presented to the jury, stated favorably to the verdict, showed that on February 12, 1990, Katherine Middleton was at work at AT & T in Lee's Summit, Missouri, when she received a phone call from her husband, the defendant, who complained of illness. She left work and drove home.
>
> Approximately twenty minutes later, at 1:52 p.m., the 9-1-1 dispatcher received a call from the defendant requesting an ambulance. The defendant told the dispatcher, "A gun just went off and hit my wife... [i]n the side of the head." Within three minutes, a second call was received by the 9-1-1 operator. The caller told the 9-1-1 operator, "There wasn't supposed to be anything in it. Oh God." While they conversed, police officer John Gale arrived at the Middleton residence located in Blue Springs, Missouri.

As Officer Gale arrived, the defendant came out of the house appearing "real frantic," which caused the officer to draw his gun. The defendant was yelling and asking where the paramedics were. When Officer Gale realized the defendant was unarmed, he holstered his gun and asked the defendant what had happened. The defendant did not answer, but instead kept yelling, "Where are the paramedics?"

It was a bright, sunny day but the blinds in the house, which were almost always open, were drawn and the inside of the house was dark. Upon entering the house, Officer Gale looked into the dining room and saw the victim, Mrs. Middleton, lying in a pool of blood on her right side. She had a bullet wound above her left eye with an exit wound on the right side of her head. He testified that it was apparent she had not been breathing for several minutes.

When Officer Gale returned to the defendant in the living room, he tried to determine what had happened.

He asked if his wife had committed suicide, and the defendant replied she had not. The defendant explained that he had been sick and had called his wife home from work. While he waited for her, he was cleaning his Smith & Wesson .357 Magnum. He explained that when his wife got home, she picked up the gun, started to walk to the other room, dropped the gun and it went off.

Officer Spartz and Sergeant Collier arrived about this time and observed the .357 Magnum lying on an ottoman. The defendant said he had picked it up and placed it there. One officer inspected the gun and found five shells and one empty cylinder. The firing pin was depressed on one of the shells, indicating it had been fired. The bullets were jacketed, hollow-point shells, designed to "mushroom back" or expand when they enter the target.

Because the defendant was acting "explosive," Officer Spartz hid the gun behind the television set. The defendant

appeared agitated, continuing to yell and flail his arms. This activity caused the officer to pat him down to make sure he did not have another weapon. Immediately following the pat down, the defendant acted surprised, became rigid, and screamed that he was going to be sick. He ran down the hallway to the bathroom. Officer Spartz followed him and saw that he was washing his hands in the sink. Both Spartz and Gale twice told the defendant to get his hands out from under the water. They finally had to pull him out. The officers did not see the defendant vomit or stand over the toilet. They did see him spit saliva into the sink.

The defendant used a hand towel to dry his hands. Officer Spartz took the defendant outside to the garage and tried to calm him down and asked him to explain exactly what happened. The defendant repeated what he had said before, except in more detail. He told the officer he had taken some pills that morning for an infection, and began sweating and feeling ill.

He called his wife to come home from work and when she arrived, she told him he looked ill and said she was going to call the doctor. She took the gun the defendant was cleaning and as she walked to the telephone, she dropped the weapon. The defendant explained that when the gun fell to the floor it went off in her face. At this point, the defendant threw up his hands and banged them against the garage door.

During the time the defendant was outside with Officer Spartz, Officer Gale looked for some indication that the defendant had been cleaning his gun. He found no evidence substantiating defendant's explanation, except for a towel upstairs. He later found a gun box and some brushes in the basement.

Paramedics Keebaugh and Wedlock arrived and determined the defendant was hyperventilating, complaining of chest pains, and his blood pressure was slightly elevated. They convinced the defendant to allow them to transport him

to the hospital for an examination. As the paramedics prepared to transport him, the defendant reached his hands into a flower planter and began rubbing his hands in the dirt. At some point after this and before the defendant was taken to the hospital, the police performed a paraffin test on his hands.

Officer Spartz rode in the ambulance with the defendant and again asked him "...to be clear as to what exactly had happened in the house." The defendant narrated the events up to the point where his wife was walking to the telephone. He abruptly stopped and closed his eyes in a manner described by the officer as "squinting" and appeared unconscious. This surprised the paramedic and caused him to perform some tests to determine defendant's medical condition. When the ambulance arrived at St. Mary's Hospital in Blue Springs, the defendant continued to appear unconscious.

Officer Spartz positioned himself at the

nurses' station and was able to observe the defendant in his room. When no one was in the room, the defendant would open his eyes and look around, but when someone came in, he would shut them. Eventually, he began to interact with hospital personnel. The police officer went into the room and the defendant agreed to resume telling the events that had taken place earlier that day. On this occasion, he described the death of his wife as follows. She came in and told him she was going to call the doctor and went to the telephone. He was sitting in the chair wiping his gun off when he got up to hand her the gun. He related that he was unsure whether he "fell back or what," but he next woke up on the floor. His wife was lying on the floor.

An autopsy showed that Mrs. Middleton was 5'6" and weighed 128 pounds, and had a single gunshot wound to the head, which the medical examiner testified was the cause of death. The entry point was above the left eye, 3 1/2" below the top of her head. The exit point was on the right side,

> 2 1/2" below the top of her head. There was a prominent area of powder stippling, i.e., small dots, present around the left side of her face over an area measuring 4 1/2" x 4".
>
> The medical examiner testified to multiple contusions on her upper chest, which were caused by a blunt trauma. The bruises were described by the examiner as consistent with someone of the defendant's size (6 feet tall, 200 pounds) "grabbing the woman by the blouse and pressing her against a wall."

State v. Middleton, 854 S.W.2d 504, 506-508 (Mo.App., W.D. 1993).

The Missouri Court of Appeals made the following specific findings concerning pretrial statements and silence by the petitioner.

> During the events that took place at the defendant's residence, as well as en route to and at the hospital, the defendant was never formally arrested, nor was he given his *Miranda* rights [footnote omitted]. In separate interviews at the house, only a few minutes apart, the defendant

gave two statements, which were factually similar were admitted into evidence. The defendant's actions and silence during the ambulance ride to the hospital were used against him, as were a third statement given at the hospital.

* * *

State v. Middleton, 854 S.W.2d at 509-10.

With respect to the defendant's assertion that when he ran into the front yard he was faced with a police officer with his gun drawn, the testimony described the defendant as being in a hysterical state. The testimony clearly explained that the officer readied his weapon for his own protection. Later events confirmed that it was not the intent of the officer to arrest the defendant. Once it became apparent that the defendant was not armed, the officer reholstered his weapon.

The officers arrived on the scene of a shooting where an individual had been killed and the survivor was in a highly agitated condition. It is

expected that they should exercise caution for their own safety. Patting-down the defendant, hiding the .357 Magnum behind the television, keeping him under observation by following him to the bathroom and accompanying him outside were actions designed to protect their own safety. Further, the officers were obligated to investigate the shooting, which included the preservation of evidence such as gunpowder residue which could be on the hands of the only survivor at the scene of a shooting.

The officer's written report that the defendant was in custody was a conclusionary statement. It was no more determinative or binding on the court's decision that defendant was in custody than if the report had said he was not in custody. The court had the discretion to give whatever weight, if any, it chose to that statement.

The defendant was never formally arrested, handcuffed, taken into custody, or restrained of his freedom to

> move at will within the house or at any other time following his second hospital stay. The police were at the residence as a result of the defendant's 9-1-1 call. With the exception of several temporary and minimal restraints, the defendant was free to move about without restraint. No one forced him to be transported to the hospital; for his own well-being, the paramedics suggested he go and he consented. There is no evidence of strong-arm tactics, deceptions or trickery to obtain incriminating statements. The police questions were straightforward. They simply asked the defendant, who was a primary source of information, to explain what occurred. Finally, the facts do not indicate a police-dominated atmosphere. Certainly, there were occasions when the defendant was restrained but these restraints were minimal, temporary and were necessary either for the officers' protection, concern for Mr. Middleton's safety or the preservation of evidence.

State v. Middleton, 854 S.W.2d at 510-511.

> These restraints, limited and temporary, did not amount to a restraint on the defendant's freedom of movement or coercive police activity to a degree that required the *Miranda* warning. The coercive aspects of a custodial interrogation were not present. No hold that at the time these statements were given, the defendant was neither formally arrested nor restrained of his freedom of movement of a degree associated with a formal arrest.
>
> Further, the activities at the house constituted an on-the-scene investigation.

Id.

> In the ambulance, the defendant was relating the events of the incident, when he closed his eyes and abruptly stopped his statement at the point where his wife had picked up his revolver and headed out of the room. The sudden unresponsiveness surprised the paramedic, and in accordance with standard practice, he conducted a series of tests. He rubbed the

defendant's sternum to obtain a response (the defendant flinched), pinched the defendant's arm (he flinched again), tried to insert a plastic tube into the defendant's mouth to create an oral airway (the defendant gagged and spit it back out), placed an ammonia capsule under the defendant's nose (he pursed his lips and blew the capsule across the ambulance), and finally, held the defendant's arm over his head and released it. If a person is unconscious, the hand will strike his face. The defendant twice moved his hand as it fell so that it struck the top of his head, rather than his face. The responses caused the paramedic to conclude that the defendant was feigning unconsciousness.

These were standard tests legitimately conducted to evaluate the defendant's medical condition. There was substantial evidence allowing the trial court to conclude that when the tests were administered by the paramedic, the defendant was not in custody, was not being questioned, and the paramedic

was not acting on behalf of the police officer. There is no evidence, except unbridled speculation, supporting defendant's theory that the tests were done in order for the officer to continue questioning the defendant. Defendant's pre-arrest silence is admissible as a tacit admission. *State v. Lawrence*, 569 S.W.2d 263, 265 (Mo.App. 1978).

The statement that defendant made at the hospital was in more detail than the previous two he had given. At the hospital, when the officer noticed that the defendant had begun to interact with hospital personnel, he went into his room. The defendant agreed to continue talking to him. After the preliminary details, the defendant stated, as related by the police officer. "And he had--he was sitting there in the chair, wiping his gun off, and he got up to hand her the gun. *He doesn't know if he fell back or what, but the next thing he knows, he woke up on the floor or he was on the floor and she was on the floor also*" (emphasis added).

> The fact that the questioning occurred at the hospital does not necessarily determine that there was custodial interrogation. *State v. Schnick*, 819 S.W.2d 330, 334 (Mo. banc 1991); *State v. Swingler*, 632 S.W.2d 267, 272 (Mo.App. 1982). When the interview took place, the defendant was not at the mercy of the officer nor was he deprived of his freedom of action to any degree by the police officer. All evidence and inferences were that the defendant could have terminated the interview at any time and directed the officer to leave. The coercive aspects of a custodial interrogation were not present. *Schnick*, 819 S.W.2d at 334. The hospital setting and the facts related to the officer's question did not transform itself into a custodial interrogation.

(Id. at 511-512).

Procedural History

The petitioner was convicted by a jury in the Circuit Court of Jackson County, Missouri in February 1991 of first degree murder and armed criminal action and

sentenced to concurrent terms of imprisonment of life without the possibility of probation or parole and 200 years imprisonment. *State v. Middleton*, 854 S.W.2d 504, 506 (Mo.App., W.D. 1993). The Missouri Court of Appeals affirmed the convictions and sentences and the denial of post-conviction relief on April 6, 1993. Id. at 504. The Court of Appeals denied a motion for rehearing and/or transfer to the Missouri Supreme Court on June 1, 1993. Id. The Missouri Supreme Court denied an application for transfer on June 29, 1993. On July 31, 1996 the petitioner filed a motion to recall the mandate challenging the effectiveness of appellate counsel in the Missouri Court of Appeals, Western District. This motion was denied on November 26, 1996.

The petitioner filed his initial petition for habeas corpus under 28 U.S.C. §2254 in the United States District Court for the Western District of Missouri on December 21, 1995. The petitioner filed a first amended petition on June 5, 1996 and a second amended petition on December 4, 1996.

The United States District Court for the Western District of Missouri denied the second amended petition for habeas corpus on April 29, 1998 denying all the claims as meritless or procedurally barred (Petitioner's Appendix at 2-44). On June 12, 1998 the District Court denied a Rule 59(e) motion challenging the standard of review used in analyzing the second amended petition (Id. at 46-49). The

District Court pointed out that not all the claims in the second amended petition related back to the original petition under the standard set out in Fed.R.Civ.P. 15(c)(2) and therefore the use of the post-Antiterrorism and Effective Death Penalty Act was appropriate on those claims and any event "all of petitioner's claims fail under both pre-AEDPA standards as well as post-AEDPA standards" (Id. at 46). The District Court denied a certificate of appealability.

The Eighth Circuit Court of Appeals after carefully reviewing the District Court file also denied a certificate of appealability (Id. at 1) and rehearing by the panel or en banc was denied without dissent (Id. at 51).

Reasons Denying the Writ

I. **This Court should not grant certiorari to determine whether the District Court erred in considering certain habeas claims under the post-AEDPA standard because the record indicates that all the petitioner's claims were found to fail under the pre-AEDPA standard as well as the post-AEDPA standard, and therefore a determination would merely be an advisory opinion.**

The petitioner contends he was denied the right to de novo review of his claims under the pre-Antiterrorism and Effective Death Penalty Act of 1996 standard even though his initial *pro se* petition was filed before April 24, 1996, the effective date of the act. Leaving aside that the petition ultimately denied was a second amended petition filed on December 24, 1996 over eight months after the effective date of the act, the claim is still unworthy of discretionary review.

The District Court found that "all of petitioner's claims fail under both pre-AEDPA standards as well as post-AEDPA standards" (Petitioner's Appendix at 46).

Because the petitioner has already received review under both pre-AEDPA and post-AEDPA standard with the same result, the question he asks concerning which standard should have been used is moot. The petitioner has already received the de novo review he seeks from this Court. The petitioner is in reality seeking an advisory opinion which cannot benefit him in his own case. Therefore certiorari should not issue on this question.

II. **This Court should not grant certiorari to review whether the petitioner was in custody when he made certain statements and performed certain acts because this is a very fact specific inquiry that presents no true conflict**

between decisions or question of general interest.

The petitioner alleges the District Court erred in finding that the record did not reflect that he was in custody or deprived of his freedom in any significant way when he made certain statements that were later used in evidence against him (Certiorari Petition at 15). The petitioner also alleges the District Court erred in its analysis in considering whether the circumstances indicated "a reasonable person would have felt that he was not at liberty to terminate the interrogation" as opposed to whether "a reasonable person would have felt that he was free to leave" (Certiorari Petition at 18). The petitioner alleges the District Court analysis conflicts with this Court's decision in *Thompson v. Koehane*, 516 U.S. 99, 112, 116 (1995), because it neglected to analyze whether a reasonable person would have felt free to leave as well as free to terminate the questioning (Petitioner's Appendix at 18).

This is factually incorrect. Explicitly relying on *Thompson v. Koehane* the District Court stated that the proper analysis was "would a reasonable person have felt he or she was not at liberty to terminate interrogation and leave" (Petitioner's Appendix 12). The District Court later cited analysis in which the Missouri Court of Appeals found that while admitted to the hospital; "all the evidence and inferences were that the defendant could have terminated the interview at any time and directed the officer to leave" (Petitioner's Appendix at 18).[1] The District Court concluded that, "The circumstances surrounding petitioner's interrogation do not establish that a reasonable person would have felt that he was not at liberty to terminate the interrogation"

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[1]When one is lying on hospital bed or ambulance stretcher for reasons independent of custody, the functional equivalent or leaving one's self, which is impractical, is being able to direct an officer to leave.

(Petitioner's Appendix at 18). Taking this sentence out of the context of the entire District Court decision, the petitioner has in reality set up the illusion of a conflict between *Thompson v. Koehane* and the District Court decision. No real conflict exists.

Insofar as the petitioner is asking this Court to disagree with the conclusion of the courts below that he was not in custody, he is presenting a very case specific and fact intensive question that is not of general interest beyond this case. This type of case specific inquiry is what the petitioner is actually seeking, and it is not an appropriate inquiry for certiorari review.

III. **This Court should not grant certiorari to review whether the District Court erred in finding certain claims to be procedurally barred because this claim presents no significant conflict with decisions of this Court or circuit courts of appeals and it presents no question of general interest, and all the claims were reviewed on the merits making the question of bar moot.**

The petitioner alleges the District Court erred in finding the claims considered in the District Court decision at pages 28 to 36 of the petitioner's appendix to be procedurally barred. The claims at pages 28-36 of the appendix are six claims of ineffective assistance of trial counsel (Petitioner's Appendix at 28-29); a claim that the prejudice from those six claims should have been considered cumulatively (Petitioner's Appendix at 30); eight complaints about closing argument (Petitioner's Appendix at 31-34); and a complaint that the prosecutor had a conflict of interest (Petitioner's Appendix at 34-36).

The ineffective assistance of trial counsel claims were found to be barred because the claims were not raised in a

motion for post-conviction review under Missouri Supreme Court Rule 29.15 or the appeal of the denial of that motion (Petitioner's Appendix at 29-30). The trial error claims were rejected as barred because these claims were not briefed on direct appeal (Petitioner's Appendix at 31-36). The petitioner's argument is that because he filed an unsuccessful motion to recall the mandate challenging the effectiveness of consolidated appellate counsel the underlying procedural bars are removed (Certiorari Petition at 20-21). This is a non sequitur. Leaving aside that ineffective assistance of post-conviction appellate counsel could not have provided cause to excuse,[2] (*Coleman v. Thompson*, 501 U.S. 722, 733 (1991)), the default of the ineffective assistance of trial counsel claims the unsuccessful allegation raised and rejected in state court that appellate counsel was ineffective for not raising a particular issue does not provide cause to excuse the default of the underlying issue. The state courts, contrary to the petitioner's assertion, have not ruled on the underlying claims that were found to be barred by the District Court and the factual premise of his argument is therefore incorrect. *See Nave v. Delo*, 62 F.3d 1024, 1031-1032 (8th Cir. 1995), *cert. denied*, 518 U.S. 1036 (1996).

Further, the petitioner asserts that but for erroneous procedural bar analysis the District Court "would have reached the merits" of his claims (Certiorari Petition at 23). The petitioner fails to note that the District Court did review the merits of each and every claim found to be procedurally barred at pages 28 through 36 of his Appendix and found each to be meritless as well as barred (Petitioner's Appendix at 28 through 36). The premise of the claim that the petitioner was wrongly denied merits review is factually

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[2]In Missouri the effectiveness of trial counsel is a post-conviction review issue. *See Lowe-Bey v. Groose*, 28 F.3d 816, 818-820 (8th Cir.), *cert. denied*, 516 U.S. 1061 (1994).

incorrect because the petitioner has received this review. Therefore because the petitioner has already received the review he seeks, the issue before this Court is moot.

IV. **This Court should not grant certiorari to review whether the court below erred in denying a certificate of appealability as opposed to denying a certificate of probable cause because the court below views the standards for granting these certificates in a case raised under 28 U.S.C. §2254 as identical and therefore the petitioner could have suffered no denying.**

The petitioner alleges the court below erred in denying a certificate of appealability in his case because he alleges his case should have been considered for a certificate of probable cause as opposed to a certificate of appealability. It is well established that in the context of a case raised under 28 U.S.C. §2254 the court below considers the standards of review for issuing a certificate of probable cause and for issuing a certificate of appealability to be identical. *See* *Ramsey v. Bowersox*, 149 F.3d 749, 759 (8th Cir. 1998), *cert. denied*, 119 S.Ct. 1083 (1999); *Tiedeman v. Benson*, 122 F.3d 518, 521 (8th Cir. 1997).

The court below did not find any issue worthy of a certificate of appealability (Petitioner's Appendix at 1). The petitioner therefore correctly does not argue that he was disadvantaged on the theory that the granting of certificates of probable cause was not issue specific, and one reviewable claim made all claims reviewable.[3] Rather, the petitioner alleges he was disadvantaged because the certificate of

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[3]Such an argument of disadvantage made in an appropriate case would fail because circuit courts of appeals could and did issue certificates of probable cause limited to specific issues under the old habeas statute. *See* *Ramsey v. Bowersox*, 149 F.3d *supra* at 759-760.

appealability provisions grant review only on constitutional claims as opposed to any federal claims and his procedurally barred claims therefore may have been considered necessarily unreviewable by the court below (Certiorari Petition at 29-30). This argument however ignores relevant Eighth Circuit precedent on this issue.

In *Nichols v. Bowersox*, 172 F.3d 1068, 1070-1071 n. 2 (8th Cir. 1999) (en banc), the Eighth Circuit Court of Appeals en banc pointed out that it does not consider the statute creating a certificate of appealability to preclude review of preliminary procedural issues which were the basis of the denial of a constitutional claim in a lower court.

The petitioner suffered no prejudice by being denied a certificate of appealability as opposed to a certificate of probable cause because the standard of review in his case was identical. Although theoretically the scope of appellant review might be narrower in a 28 U.S.C. §2255 case challenging a federal statutory violation as opposed to a constitutional violation that hypothetical is not relevant to the petitioner's case. Because he received what he would have received had a certificate of probable cause been denied, no substantive conflict exists with cases indicating a certificate of probable cause should be granted or denied on pre-AEDPA petitions.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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of Missouri

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Supreme Court, U.S.
FILED
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No. 99-268

In The

Supreme Court of the United States

KENNETH G. MIDDLETON,

Petitioner,

v.

MICHAEL KEMNA, Superintendent,
Crossroads Correctional Center,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT REFUSED TO REVIEW DE NOVO MIXED QUESTIONS OF FACT AND LAW PRESENTED IN MIDDLETON'S PETITION FOR WRIT OF HABEAS CORPUS FILED NOVEMBER 13, 1995, WELL BEFORE THE EFFECTIVE DATE OF THE AEDPA.

Mr. Middleton demonstrated in his opening petition that the district court relied upon the standard of review under the AEDPA to deny claims that were adequately presented in his pre-AEDPA petition for writ of habeas corpus, in violation of *Lindh v. Murphy*, 521 U.S. 320 (1997). See Petition, 10-13. The respondent's sole reply is that the district court, in dicta, made an isolated statement that petitioner's claims fail under pre-AEDPA standards. Reply, page 18. The record reveals, in spite of the district court's statement, that de novo review was denied on specific claims, with no reference whatsoever to pre-AEDPA standards. These include petitioner's challenge to the sufficiency of the evidence,[1] his Fifth Amendment claim that witnesses and prosecutors commented on his silence while in police custody,[2] his claim that his trial counsel was ineffective,[3] and his claim of ineffective

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[1] The district court nearly held that "the opinion of the opinion of the Missouri Court of Appeals is consistent with a reasonable application of the United States Supreme Court precedent of *Jackson v. Virginia*, 443 U.S. 307 (1979)." App. 11.

[2] The district court addressed only the AEDPA standard, stating "the decision of the Missouri Court of Appeals was a reasonable application of the United States Supreme Court precedent. 28 U.S.C. § 2254(d)." *Drinkard v. Johnson*, 97 F.3d at 769. App. 22.

[3] The district court ruled that the state court "acted reasonably in denying petitioner's claim" and "reasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984)." App. 28.

assistance of post-conviction counsel.[4] On these claims in particular, the district court made no reference to any standard other than the deferential standard provided for in revised § 2254(d). As this Court has recognized, "it is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." *Schlup v. Delo*, 513 U.S. 298, 333 (1995) (O'Connor, J. concurring), citing *Cooter & Gel v. Hartmarx Corp.*, 496 U.S. 384 (1990). The district court's passing reference, in dicta, that petitioner's claims are meritless is an inadequate substitute for the de novo review required by the pre-ADEPA standards of review.

II.

THE COURTS BELOW REFUSED TO INDEPENDENTLY ADJUDICATE MR. MIDDLETON'S MIRANDA CLAIM IN VIOLATION OF *THOMPSON V. KOEHANE*, 516 U.S. 99 (1995).

Respondent accuses petitioner of taking the district court's ruling out of context, and claims that the district court articulated the appropriate standard in its discussion of Middleton's claim. However, the district court's language upon which respondent relies is not the actual ruling of the district court, which is set out in full in Mr. Middleton's petition at page 15:

> The record in the case at bar does not reflect that petitioner was taken into custody *or deprived of his freedom in any significant way by the police*. The circumstances surrounding petitioner's interrogation do not establish that a reasonable person would have felt that he was not *at liberty to terminate the interrogation*.

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[4] The district court wrote that "the determination of the Missouri Court of Appeals . . . that counsel was not ineffective may only be reviewed for reasonableness . . . ," citing 28 U.S.C. § 2254(d)." App. 38.

(App. 19). The balance of the district court's opinion merely quotes verbatim from the opinion of the Missouri Court of Appeals. The record amply supports petitioner's claim that the district court erroneously equated a determination of "custody" with a determination that a prisoner "was not at liberty to terminate the interrogation." App. 19. Contrary to respondent's suggestion, this is indeed a case in which this Court should exercise its supervisory power pursuant to U.S.S.Ct.R. 10(a) & (c).

III.

THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER A DISTRICT COURT MAY PROCEDURALLY BAR CLAIMS AND EVIDENCE EXPLICITLY REVIEWED ON THE MERITS BY A STATE COURT.

Petitioner contends that the district court abused its discretion when it refused to review claims that were decided on the merits by the Missouri Court of Appeals. Petition, pages 21-25. Missouri responds that the state courts "have not ruled on the underlying claims that were found to be barred by the district court and the factual premise of his argument is therefore incorrect." Brief in Opposition, page 21. Submitted herewith is district court Exhibit 10, a communication to Mr. Middleton from the Missouri Court of Appeals advising him that the motion was indeed "reviewed on the merits" by the Missouri Court of Appeals. The factual premise of petitioner's obvious argument is therefore firmly established.

Respondent also claims that the district court alternatively reached the merits and denied each and every claim without reliance on the procedural bar. This is not true with respect to Ground 14, alleging that the prosecuting attorney violated petitioner's right to due process of law because he compensated a witness to provide misleading testimony. See App. 43-44. Further, the district court summarily rejected Mr. Middleton's claim that his

state court counsel were ineffective for failing to challenge the fruits of a warrantless search, without exigent circumstances, of Mr. Middleton's residence. App. 40-41. The record conclusively establishes that no warrant was obtained to search petitioner's house and remove items of evidence. There were no exigent circumstances to justify a warrantless search, as these items were seized after the scene was secured and Mr. Middleton was transported to the hospital. This Court's recent decision in *Flippo v. West Virgina*, No. 98-8770 (Oct. 18, 1999), makes it unmistakably clear that *Mincey v. Arizona*, 437 U.S. 385 (1978), continues to stand for the proposition that there is no "murder scene exception" to the warrant clause of the Fourth Amendment. A review on the merits of Mr. Middleton's claim, pursuant to *Kimmelmann v. Morrison*, 477 U.S. 365 (1986), that his attorneys were ineffective for failing to press his Fourth Amendment rights would unquestionably prevail in light of the continued vitality of *Mincey*. Therefore, respondent's claim that this argument is rendered moot by the district court's alleged "review on the merits" (Brief in Opposition, page 20) cannot withstand scrutiny. This court should therefore issue the writ to review this important question.

IV.

THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE PRACTICE OF THE EIGHTH CIRCUIT TO RETROACTIVELY APPLY THE CERTIFICATE OF APPEALABILITY REQUIREMENT OF 28 U.S.C., § 2253 (1996) TO APPEALS FROM THE DENIAL OF HABEAS CORPUS PETITIONS FILED PRIOR TO THE ENACTMENT OF THE ANTI-TERRORISM EFFECTIVE DEATH PENALTY ACT.

Since the filing of Mr. Middleton's petition for writ of habeas corpus, this court has directed supplemental briefing in *Slack v. McDaniel*, No. 98-6322 (Order entered Oct.

18, 1999), on this very issue. Also see *Chambers v. Bowersox*, No. 97-3067 (8th Cir. Order filed Nov. 5, 1999), suspending proceedings in an Eighth Circuit case pending this court's resolution of this issue.

Respondent claims that no issue is presented because the Eighth Circuit has held that the standard for issuing a Certificate of Appealability is identical to that for issuing a Certificate of Probable Cause to Appeal. Brief in Opposition, pp. 22-23. That position is undermined by the afore-mentioned order in *Chambers v. Bowersox*, as well as the abrupt change in the actual practice of the Court of Appeals, in which Certificates of Appealability are routinely denied, in contrast to the court's practice of routinely granting Certificates of Probable Cause. See Petition, pp. 28-30.

CONCLUSION

For the foregoing reasons, this court should grant the writ of certiorari to review the judgment below.

Respectfully submitted,

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February 20, 1997

Kenneth G. Middleton #179112
Potosi Correctional Center
Rt. 2 Box 2222
Mineral Point, MO 63660

RE: State v. Kenneth G. Middleton, WD 44671

Dear Mr. Middleton:

The entire court reviewed your motion to recall the mandate. Your motion was reviewed on the merits and denied by the entire court. Terence Lord is the Clerk of the Court and your correspondence comes from the Clerk's office. However, Mr. Lord was not involved in the ruling on your motion to recall the mandate.

Sincerely,

/s/ Lorry K. Kelly
Lorry K. Kelly
Staff Counsel